Docket for 03-9627

(11)

No. 03-9627
Title: John A. Pace, Petitioner
v.
David DiGuglielmo, Superintendent, State Correctional Institution at Graterford, et al.
Docketed: March 31, 2004
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (02-3049)
Decision Date: July 30, 2003
Rehearing Denied: October 6, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Dec 23 2003	Application (03A540) to extend the time to file a petition for a writ of certiorari from January 4, 2004 to March 4, 2004, submitted to Justice Souter.
Dec 31 2003	Application (03A540) granted by Justice Souter extending the time to file until March 4, 2004.
Mar 4 2004	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 30, 2004)
Apr 12 2004	Waiver of right of respondents Donald T. Vaughn, Superintendent, State Correctional Institution at Graterford, et al. to respond filed.
Apr 28 2004	DISTRIBUTED for Conference of May 13, 2004.
May 4 2004	Response Requested . (Due June 3, 2004)
Jun 2 2004	Order extending time to file response to petition to and including July 6, 2004.
Jun 29 2004	Order further extending time to file response to petition to and including August 2, 2004.
Aug 2 2004	Order further extending time to file response to petition to and including August 16, 2004.
Aug 16 2004	Brief of respondents David DiGuglielmo, Superintendent, State Correctional Institution at Graterford, et al. in opposition filed.
Aug 20 2004	Letter of August 17, 2004, from counsel for respondents received. (Distributed)
Aug 26 2004	DISTRIBUTED for Conference of September 27, 2004.
Sep 15 2004	Reply of petitioner John A. Pace filed. (Distributed)
Sep 28 2004	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Oct 21 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including December 13, 2004.
Dec 3 2004	Further extension of time to file the joint appendix and petitioner's brief on the merits to and including December 16, 2004.
Dec 15 2004	SET FOR ARGUMENT ON Monday, February 28, 2005.
Dec 16 2004	Joint appendix filed. (Jt. appendix in two volumes).
Dec 16 2004	Brief of petitioner John A. Pace filed.
Dec 16 2004	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Jan 10 2005	Record received from U.S.C.A. - 3rd Circuit. (1 envelope)
Jan 14 2005	Record received from U.S.D.C. - Eastern Dist. of Pennsylvania. (1 envelopes)
Jan 20 2005	Brief amici curiae of Alabama, et al. filed.
Jan 21 2005	Brief of respondent David DiGuglielmo, Superintendent, State Correctional Institution at Graterford filed.

Feb 15 2005	Reply of petitioner John A. Pace filed. (Distributed)
Feb 28 2005	Argued. For petitioner: David Wycoff, Assistant Federal Defender, Philadelphia, Pa. For respondents: Ronald Eisenberg, Deputy District Attorney, Philadelphia, Pa.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

Supreme Court, U.S.
FILED
MAR 04 2004
OFFICE OF THE CLERK

(10)

NO. 03A540

JOHN PACE,

Petitioner,

v.

DONALD VAUGHN; OFFICE OF THE DISTRICT ATTORNEY OF PHILADELPHIA; ATTORNEY GENERAL OF PENNSYLVANIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Dated: March 4, 2004

03-9627

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

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Dated: March 4, 2004

QUESTIONS PRESENTED

1. Should this Court grant the writ to resolve a conflict between the Courts of Appeal regarding an important question that this Court explicitly reserved in Artuz v. Bennett, 531 U.S. 4 (2000) – whether an untimely state post-conviction petition may be "properly filed" under § 2244(d)(2)?

2. Should this Court grant the writ to resolve a conflict between the Courts of Appeal regarding whether Carey v. Saffold, 536 U.S. 214 (2002) answered the question about "properly filed" that Artuz reserved?

3. Should this Court grant the writ to answer the question about "properly filed" which was reserved by Artuz and which the Third Circuit decided erroneously?

4. Should this Court grant the writ and review the Third Circuit's denial of equitable tolling, where the Third Circuit denies all federal habeas review to petitioners who act appropriately, reasonably and diligently, and as demanded by the exhaustion requirement, in seeking state court remedies?

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I. This Court should grant the writ to resolve a conflict between the Courts of Appeal regarding an important question that this Court explicitly reserved in Artuz v. Bennett, 531 U.S. 4 (2000) – whether an untimely state post-conviction petition may be "properly filed" under § 2244(d)(2). 13

- A. The Second, Fifth, Ninth and Eleventh Circuits hold that untimely state post-conviction proceedings can be "properly filed" under § 2244(d)(2). 14
- B. The Third and Seventh Circuits hold that all untimely state post-conviction proceedings are per se not "properly filed" under § 2244(d)(2). 17

II. This Court should grant the writ to resolve a conflict between the Courts of Appeal regarding whether Carey v. Saffold, 536 U.S. 214 (2002), answered the question about "properly filed" that was reserved in Artuz. 18

- A. The Third and Seventh Circuits erroneously believe that Saffold decided the "properly filed" issue that Artuz reserved. 19
- B. The Second, Fifth, Ninth and Eleventh Circuits recognize that Saffold did not decide the "properly filed" issue that Artuz reserved. 21

III. This Court should grant the writ because the Third Circuit erred in its resolution of the important issue that this Court reserved in Artuz. 23

- A. The Third Circuit defines "properly filed" in a way that was rejected by Artuz, and that is inconsistent with this Court's precedent regarding the importance of habeas corpus 23
- B. Under Artuz's analysis, a PCRA petition that is ultimately deemed untimely by the state courts is "properly filed" under § 2244(d)(2). 25

IV. This Court should grant the writ and review the Third Circuit's denial of equitable tolling, which denies all federal habeas review to petitioners who act "appropriately," "reasonably" and "diligently," and as demanded by the exhaustion requirement, in seeking state court remedies. 27

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Petitioner, John Pace, respectfully asks that the Court issue its writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, Pace v. Vaughn, 2003 WL 21754982 (3d Cir. July 30, 2003) ("Pace-3"), is appended as Exhibit A. The Third Circuit's October 6, 2003 order denying en banc rehearing is appended as Exhibit B. The opinions of the United States District Court for the Eastern District of Pennsylvania, Pace v. Vaughn, 151 F.Supp.2d 586 (E.D. Pa. 2001) ("Pace-1") and Pace v. Vaughn, 2002 WL 485689 (E.D. Pa. March 29, 2002) ("Pace-2"), are appended as Exhibits C and D, respectively.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Third Circuit denied en banc rehearing on October 6, 2003. This Court granted Petitioner an extension of time until March 4, 2004 in which to file this petition (see Exhibit E).

STATUTORY PROVISIONS INVOLVED

This case involves the one year statute of limitations in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which states, in pertinent part:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. ...
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1)-(2).

STATEMENT OF THE CASE

State Court: In 1986, Petitioner, then just 17 years old, pled guilty to second-degree murder in the Philadelphia, Pennsylvania, Court of Common Pleas. His lawyer did not appeal. Petitioner

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[1] All emphasis herein is supplied unless otherwise indicated. Respondents are referred to as "the Commonwealth."

later learned that his lawyer had given him grossly erroneous information about the sentence he would get – he was told he would serve 10-to-15 years when, in fact, the mandatory sentence was life without parole. Petitioner therefore sought state post-conviction relief, which was denied in 1992.

On November 27, 1996, Petitioner filed in the Philadelphia Court of Common Pleas a pro se petition under Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa. C.S. §§ 9541 et seq., again seeking state post-conviction relief. The significance of this PCRA filing can only be understood within the context of Pennsylvania post-conviction law at the time of that filing. We therefore describe that law.

On January 16, 1996, Pennsylvania's legislature amended the PCRA and, for the first time, added time limits. Under the new time limits, a PCRA petition is timely if filed within one year of when the conviction became final, 42 Pa. C.S. § 9545(b)(1); a PCRA claim filed outside this one year period is timely if failure to earlier raise the claim resulted from interference by governmental officials, if the claim is based on newly discovered facts, or if the claim is based on a new rule of constitutional law, § 9545(b)(1)(i)-(iii). Under the statutory language, claims based on these three exceptions to the one year period must be filed within 60 days of the date on which the governmental interference ended, the new facts were discovered, or the new rule of constitutional law became applicable. 42 Pa. C.S. § 9545(b)(2).

Petitioner's conviction became final in 1986, when trial counsel failed to file a direct appeal. Thus, under the statutory language of the 1996 PCRA amendments, Petitioner's PCRA claims were time-barred in 1987 (nine years before the time-bar was first added to the PCRA), unless those claims satisfied an exception in § 9545(b).

Pennsylvania caselaw at the time of Petitioner's November 1996 filing, however, strongly suggested that his claims would be considered on their merits even if they did not satisfy any statutory exception to the PCRA's one year time limit. When Petitioner filed his PCRA petition, in

November 1996, Pennsylvania's courts did not treat the PCRA's statutory bar rules as the last word. Instead, Pennsylvania's courts had developed a large body of caselaw establishing ways in which the PCRA's statutory bar rules would be overcome, requiring merits review of claims that seemingly were barred by the PCRA's statutory language. In particular, Pennsylvania's courts required merits review of claims that were barred by the PCRA's statutory bar rules when: (1) failure to raise the claim earlier was caused by ineffective assistance of prior counsel (including prior post-conviction counsel);[2] (2) failure to address the merits of the claim could result in a "miscarriage of justice";[3] or (3) the claim challenged the legality of the sentence.[4] See also Louis Natali, Jr., New Bars in

[2] E.g., Lambert v. Blackwell, 134 F.3d 506, 522 n.27 (3d Cir. 1998) ("[T]he Commonwealth acknowledged in its letter brief ... Pennsylvania decisional law holding that 'PCRA courts will consider claims which otherwise would be deemed waived when raised under the rubric of ineffective assistance of counsel'"); Commonwealth v. Holloway, 739 A.2d 1039, 1044 (Pa. 1999); Commonwealth v. Porter, 728 A.2d 890, 895 n.3 (Pa. 1999); Commonwealth v. Holland, 727 A.2d 563, 565 (Pa. 1999); Commonwealth v. Pursell, 724 A.2d 293, 303 (Pa. 1999); Commonwealth v. Albrecht, 720 A.2d 693, 699-700 (Pa. 1998); Commonwealth v. Howard, 719 A.2d 233, 236 n.2 (Pa. 1998); Commonwealth v. Morales, 701 A.2d 516, 520 (Pa. 1997); Commonwealth v. Carbone, 707 A.2d 1145, 1150 (Pa. Super. 1998).

[3] E.g., Hull v. Kyler, 190 F.3d 88, 101 n.4 (3d Cir. 1999); Lambert, 134 F.3d at 520-21; Doctor v. Walters, 96 F.3d 675, 682-83 (3d Cir. 1996); Commonwealth v. Lawson, 549 A.2d 107, 112 (Pa. 1988); Commonwealth v. Huffman, 638 A.2d 961, 963 (Pa. 1994); Commonwealth v. Bazemore, 614 A.2d 684, 685, 687 (Pa. 1992); Commonwealth v. Romansky, 702 A.2d 1064, 1065-67 (Pa. Super. 1997); Commonwealth v. Williams, 660 A.2d 614, 619 (Pa. Super. 1995); Commonwealth v. Santiago, 591 A.2d 1095, 1114-17 (Pa. Super. 1991); Commonwealth v. McFadden, 587 A.2d 740, 742, 744 (Pa. Super. 1991); Commonwealth v. Ryan, 575 A.2d 949, 951 (Pa. Super. 1990); Commonwealth v. Hoyman, 561 A.2d 756, 758-59 (Pa. Super. 1989); Crawley v. Horn, 7 F.Supp.2d 587 (E.D. Pa. 1998); Sutton v. Vaughn, 741 F.Supp. 564, 566 (E.D. Pa. 1990); Hammock v. Vaughn, 1998 WL 163194, *1, *5 (E.D. Pa. Apr. 7, 1998); Belle v. Stepanik, 1996 WL 663872, *6-*7 (E.D. Pa. Nov. 14, 1996); Cummings v. Love, 1994 WL 164122, *3-*4 (E.D. Pa. May 3, 1994); see also Commonwealth v. Conway, 706 A.2d 1243, 1244 (Pa. Super. 1997) (assuming that challenge to legality of sentence trumps PCRA time-bar).

[4] E.g., Commonwealth v. Vasquez, 744 A.2d 1280, 1284 (Pa. 2000); Commonwealth v. Johnson, 669 A.2d 315, 321 (Pa. 1995); Commonwealth v. Shannon, 608 A.2d 1020, 1024 (Pa. 1992); Commonwealth v. Smith, 598 A.2d 268, 270 (Pa. 1991); Commonwealth v. Norris, 446 A.2d 246, 251 n.9 (Pa. 1982); Commonwealth v. Walker, 362 A.2d 227, 230 (Pa. 1976); Commonwealth v. Moss, 689 A.2d 259, 262 (Pa. Super. 1997); Williams, 660 A.2d at 618; Commonwealth v. Anderson, 643 A.2d 109, 111 (Pa. Super. 1994); Commonwealth v. Quinlan, 639 A.2d 1235, 1238

Pennsylvania Capital Post-Conviction Law and Their Implications for Federal Habeas Corpus Review, 73 TEMPLE L. REV. 69, 87 (2000) (hereinafter "*New Bars*") (discussing these bar-overcoming rules); Thomas Place, The Claim Is Cognizable but the Petition Is Untimely: The Pennsylvania Supreme Court's Recent Collateral Relief Decisions, 10 TEMP. POL. & CIV. RTS. L. REV. 49, 72-75 (2000) (hereinafter "*Claim Is Cognizable*") (discussing ineffective assistance of counsel and illegality of sentence bar-overcoming rules).

These long-established bar-overcoming rules (ineffective assistance of counsel, illegality of sentence, miscarriage of justice) had "no statutory basis" in the PCRA or any other statute. *New Bars* at 99. Instead, "[t]hey [we]re entirely court-made, and they were consistently used to afford merits review to claims for which such review was foreclosed by the PCRA's statutory language." Id. Because these bar-trumping rules were court-made, not statutory, and were used to overcome statutory bar rules, Pennsylvania prisoners could reasonably expect these court-made anti-bar rules to apply to the post-1996 PCRA, just as they applied to the pre-1996 PCRA, until a definitive state court ruling held that these anti-bar rules would no longer be applied. Id. at 100-01. In particular, it was reasonable to believe that these court-made anti-bar rules would be applied to the PCRA's new time limits – i.e., claims that were untimely under the PCRA's statutory language would still be afforded merits review if the petitioner asserted ineffective assistance of prior counsel, illegality of sentence and/or miscarriage of justice. Id. at 100-01. Unless and until the state courts abandoned these court-made rules, Pennsylvania prisoners reasonably expected they would trump the PCRA time-bar, just as they trumped other statutory PCRA bar rules.

(Pa. Super. 1994); Commonwealth v. Green, 593 A.2d 899, 900 n.1 (Pa. Super. 1991); Commonwealth v. O'Neil, 573 A.2d 1112, 1114 (Pa. Super. 1990); Commonwealth v. Carr, 543 A.2d 1232, 1234 (Pa. Super. 1988); Commonwealth v. Howard, 540 A.2d 960, 961 (Pa. Super. 1988); Commonwealth v. Campbell, 505 A.2d 262, 265 (Pa. Super. 1986); Commonwealth v. Irving, 500 A.2d 868, 872 (Pa. Super. 1985); Commonwealth v. Neidig, 489 A.2d 921, 924-25 (Pa. Super. 1985); Commonwealth v. Padden, 483 A.2d 950, 951 (Pa. Super. 1984); Commonwealth v. Mitchell, 465 A.2d 1284, 1287-88 (Pa. Super. 1983); Commonwealth v. Ford, 461 A.2d 1281, 1289 (Pa. Super. 1983); Commonwealth v. Welch, 435 A.2d 189, 189 (Pa. Super. 1981).

Pennsylvania's courts did not clearly abandon these traditional bar-overcoming rules until long after Petitioner filed his November 1996 PCRA petition. Pennsylvania appellate courts first addressed the PCRA time limits on December 17, 1997, over a year after Petitioner filed his PCRA petition, when two Superior Court panels held PCRA claims time-barred. See Commonwealth v. Alcorn, 703 A.2d 1054 (Pa. Super. 1997); Commonwealth v. Conway, 706 A.2d 1243 (Pa. Super. 1997).[5] These decisions, however, did not clearly abandon the traditional court-made bar-overcoming rules. If anything, they suggested that the new PCRA time-bar would be overcome by the court-made anti-bar rules, as were other statutory bars.[6]

Alcorn did not address the bar-overcoming issue at all – there is no suggestion in Alcorn that the petitioner raised the argument or asserted an anti-bar rule. Conway found the petitioner's claim untimely under the PCRA's statutory language but went on to "assume that [the claim] constitutes a non-waivable challenge to the legality of the sentence," which trumped the PCRA time-bar. Id., 706 A.2d at 1244. Conway then addressed the claim on its merits. Id. Thus, Conway suggested that traditional anti-bar rules (there, a challenge to the legality of the sentence) would trump the PCRA time-bar just as they trumped other statutory bars.[7]

Subsequent Superior Court decisions, in June and September 1998, further suggested that the court-made anti-bar rules would continue to trump the PCRA's statutory bars. In Commonwealth v. Hall, 713 A.2d 650, 651 (Pa. Super. 1998), the court "avoided" a "decision on the constitutionality of" the PCRA time limits by addressing time-barred claims on their merits. In Commonwealth v. Little, 716 A.2d 1287, 1289 (Pa. Super. 1998), the court held that the "prisoner mailbox rule" applies to PCRA filing times, and rejected the Commonwealth's argument that only

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[5] In both Alcorn and Conway, the lower court did not apply the time-bar, reflecting the uncertain state of Pennsylvania law at the time.

[6] Moreover, as decisions of Pennsylvania's intermediate appellate court, they could not make clear that the traditional anti-bar rules were abandoned; only the Pennsylvania Supreme Court could.

[7] Conway did not discuss miscarriage of justice or ineffective assistance of prior counsel.

the exceptions to filing times set forth in the PCRA statute should apply. Hall and Little thus suggested that Pennsylvania's courts would apply the new time-bar just as they applied other PCRA statutory bar rules – in a flexible way where court-made rules could trump the statute and allow merits review.

This uncertainty in state law was not clarified until, at the earliest, the Pennsylvania Supreme Court decided Commonwealth v. Banks, 726 A.2d 374 (Pa. 1999), in March 1999, and "held that the one-year period for filing under the PCRA is jurisdictional, and the only cognizable exceptions are those enumerated in the statute." Szuchon v. Lehman, 273 F.3d 299, 323 n.14 (3d Cir. 2001).[8] This clarification, however, came long after Petitioner's November 1996 PCRA filing.

It was in this unclear state law context that Petitioner filed his November 1996 PCRA petition. At the time of that filing, it appeared that the state courts' traditional bar-overcoming rules (miscarriage of justice, ineffective assistance of counsel, illegality of sentence) would trump the PCRA time-bar. In accord with what appeared to be state law at the time, Petitioner alleged in his PCRA petition that his claims met all of the court-made bar-overcoming rules. He alleged, inter alia, that: "the imposition of a life sentence without eligibility for parole was illegal; his guilty plea was entered involuntarily; and, that all counsel were ineffective, resulting in a miscarriage of justice."

[8] See also Commonwealth v. Lambert, 765 A.2d 306, 322-23 (Pa. Super. 2000) (before August 1999 decision in Commonwealth v. Fahy, 737 A.2d 214 (Pa. 1999), prisoners reasonably believed PCRA time-bar was subject to exceptions other than those set forth in statute); *Claim is Cognizable* at 74 (Pennsylvania Supreme Court's decision in "Fahy [August 1999] ignores settled precedent" regarding the "illegal sentence" and "ineffective assistance of counsel" bar-overcoming rules); id. at 81 ("Neither the language, structure, nor legislative history of the [PCRA's time-bar] ... suggest that the legislature intended the filing period to act as a jurisdictional bar."); id. at 69-71 (same); id. at 71 (even if the Pennsylvania Supreme Court was correct to deem the time limits "jurisdictional," it ignored "a substantial body of case law in Pennsylvania holding that time limits that are jurisdictional are subject to equitable exceptions"); Banks v. Horn, 271 F.3d 527, 534 (3d Cir. 2001) (before Pennsylvania Supreme Court's 1999 Banks decision, petitioners "could reasonably have viewed the state time limit as a mere statute of limitations ..., not ... a jurisdictional requirement"); Lambert, 134 F.3d at 522 (referring to PCRA time limits as "statute of limitations").

Commonwealth v. Pace, No. 3642 Philadelphia 1997, slip op. at 3 (Pa. Super. Dec. 3, 1998).[9] At that time, there was no state court opinion rejecting application of these court-made rules, and it was reasonable to believe they still applied, as they always had, and would trump the PCRA time-bar just as they trumped statutory bars in the pre-amendment PCRA.

The Court of Common Pleas' treatment of Petitioner's November 1996 PCRA petition is consistent with these long-established state court anti-bar rules. The Court of Common Pleas did not deem Petitioner's PCRA claims untimely. Instead, it appointed counsel to represent Petitioner, allowed appointed counsel to amend and brief the PCRA claims, and ruled on the merits. The Court of Common Pleas denied PCRA relief on June 23, 1997, without ever even mentioning the PCRA time limits.[10]

After the Court of Common Pleas denied relief, appointed counsel withdrew and Petitioner

[9] In addition to Petitioner's explicit statement of the three bar-overcoming rules (ineffective assistance of counsel, illegality of sentence, miscarriage of justice), his allegation that "his guilty plea was entered involuntarily" also falls within Pennsylvania's "miscarriage of justice" exception to bar. See Ryan, 575 A.2d at 950-51.

[10] Similarly, in many other PCRA cases filed around the same time as Petitioner's the state courts ruled on the merits of facially time-barred PCRA claims. E.g., Commonwealth v. Roman, 730 A.2d 486, 487 (Pa. Super. 1999) (common pleas court held hearing and granted relief on untimely PCRA petition, filed in October 1997); Commonwealth v. Camps, 772 A.2d 70, 72 (Pa. Super. 2001) (common pleas court appointed counsel and ruled on merits of untimely PCRA petition, filed in January 1999); Commonwealth v. Hutchins, 760 A.2d 50, 52 (Pa. Super. 2000) (common pleas court held hearing and ruled on merits of untimely PCRA petition, filed in March 1998); Commonwealth v. Weimer, 756 A.2d 684, 685 (Pa. Super. 2000) (common pleas court ruled on merits of untimely PCRA petition, filed in May 1998); Commonwealth v. DiVentura, 734 A.2d 397, 398 (Pa. Super. 1999) (same for petition filed in October 1998); Commonwealth v. DeHart, 730 A.2d 991, 992 (Pa. Super. 1999) (same for petition filed in January 1997); Commonwealth v. Austin, 721 A.2d 375, 377 (Pa. Super. 1998) (same); Commonwealth v. Perry, 716 A.2d 1259, 1260-61 (Pa. Super. 1998) (same for petition filed in December 1996); Commonwealth v. Alcorn, 703 A.2d 1054, 1055-56 (Pa. Super. 1997) (same for petition filed in September 1996); Commonwealth v. Conway, 706 A.2d 1243, 1244 (Pa. Super. 1997) (same for petition filed on January 17, 1996); see also Commonwealth v. Carr, 768 A.2d 1164, 1166 (Pa. Super. 2001) (common pleas court denied PCRA petition as untimely only after appointing counsel and allowing counsel to amend); Commonwealth v. Barrett, 761 A.2d 145, 146 (Pa. Super. 2000) (same); Commonwealth v. Lusch, 759 A.2d 6, 8 (Pa. Super. 2000) (same).

appealed, pro se, to the Superior Court. Several months after Petitioner filed his notice of appeal, other Superior Court panels issued the Alcorn and Conway decisions (discussed above), the first decisions discussing the PCRA time-bar. The Commonwealth then filed a letter brief in the Pace Superior Court, asserting that Alcorn required dismissal of Petitioner's claims. On December 4, 1998, the Pace Superior Court, citing Alcorn, dismissed Petitioner's claims as untimely. The Court did not address Petitioner's anti-bar arguments (miscarriage of justice, ineffective assistance of counsel, illegality of sentence).

In response to the Superior Court's dismissal, Petitioner filed an *Application for Reargument*, in which he pointed out that the Superior Court had overlooked his anti-bar arguments and asked the Court to reconsider because, as he had pointed out in his original Superior Court brief, those anti-bar arguments should overcome any statutory bar, including the time-bar. At the same time, Petitioner also invoked the statutory "governmental interference" exception to the PCRA time-bar, 42 Pa. C.S. § 9545(b)(1)(i), explaining that prison officials had seized his legal documents, thus preventing him from filing earlier. See Pace-1 at 590; Pace-2 at *2.[11] On February 8, 1999, the Superior Court

[11] In the Third Circuit, the Commonwealth criticized Petitioner for first invoking "governmental interference" in his Superior Court reargument. The Commonwealth's critique is unfounded. When Petitioner filed his PCRA petition in the Court of Common Pleas it was reasonable to believe that the time limits were trumped by court-made anti-bar rules, and that they were an ordinary statute of limitations, and thus waived if not raised by the Commonwealth. See Banks, 271 F.3d at 534. The Commonwealth did not raise the time-bar in the Court of Common Pleas and that court did not rely on it in denying relief. Thus, there was no reason for Petitioner to address it in the Court of Common Pleas. Similarly, Petitioner had no reason to anticipate the time-bar in Superior Court, since the Commonwealth did not raise it below and the lower court did not rely on it. Under these circumstances, a limitations defense is usually waived. See 2 Standard Pennsylvania Practice 2d §§ 13.11, 13:93 (West 2002). The Superior Court's decision was the first time the time-bar was applied to Petitioner. His reargument application was his first opportunity to address it. Arguments against the PCRA time-bar are not waived under such circumstances. Commonwealth v. Beasley, 741 A.2d 1258, 1261 (Pa. 2000) ("Appellant does not discuss in his brief the issue of timeliness ... However, since Peterkin [decided in December 1998] was the first decision of this court interpreting the new amendments to the PCRA, and since appellant's PCRA petition and his brief to this court were both filed prior to that decision, we have, in the interest of fairness, reviewed the numerous issues set forth in appellant's brief in an effort to ascertain whether any of those issues arguably fit within one or more of the exceptions"); Commonwealth v. Yarris, 731 A.2d

denied reargument without comment. Petitioner sought discretionary review in the Pennsylvania Supreme Court, which was denied on July 29, 1999.

Federal District Court: On December 22, 1999, Petitioner, still pro se, filed a habeas petition in the United States District Court for the Eastern District of Pennsylvania (Chief Judge James T. Giles). The Commonwealth asserted that the habeas petition was untimely under AEDPA because, the Commonwealth claimed, Petitioner's PCRA petition did not toll AEDPA's one year statute of limitations. It is undisputed that the habeas petition is timely if the PCRA petition tolled AEDPA's limitations period.

The District Court rejected the Commonwealth's AEDPA time-bar arguments, finding both statutory tolling under 28 U.S.C. § 2244(d)(2) (tolling during "properly filed" state post-conviction proceedings), and equitable tolling. Pace v. Vaughn, 151 F.Supp.2d 586 (E.D. Pa. 2001) ("Pace-1"). The Commonwealth moved for reconsideration or permission to appeal. The District Court then appointed undersigned counsel to represent Petitioner. After further briefing and argument, the District Court denied the Commonwealth's motion for reconsideration, but allowed an appeal. Pace v. Vaughn, 2002 WL 485689 (E.D. Pa. March 29, 2002) ("Pace-2").

The District Court found statutory tolling under § 2244(d)(2) because the PCRA petition was "properly filed" as that term is interpreted by this Court, in Artuz v. Bennett, 531 U.S. 4 (2000), and by the Fifth and Ninth Circuits applying Artuz in similar situations, Smith v. Ward, 209 F.3d 383 (5th Cir. 2000); Dictado v. Ducharme, 244 F.3d 724 (9th Cir. 2001). See Pace-2 at *5-*8.

The District Court recognized that Artuz "specifically left open the question" presented here – whether an untimely state post-conviction petition may be "properly filed" under § 2244(d)(2). Pace-2 at *5. The District Court found, however, that Artuz's analysis shows that an untimely PCRA petition is "properly filed." Id. In Artuz, this Court found a state post-conviction petition

581, 587 (Pa. 1999) (reviewing to see if any claim meets statutory exception, where "[n]either the parties nor the lower courts have discussed the timeliness of Appellant's second [PCRA] petition").

"properly filed" when all of its claims were procedurally barred under state law: the "question whether an application has been properly filed is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." Pace-2 at *5 (quoting Artuz at 9). In addressing the "properly filed" issue, "Artuz distinguishe[d] between state [post-conviction] statutes ... which set forth 'a condition to filing' as opposed to 'a condition to obtaining relief.'" Pace-2 at *5 (quoting Artuz at 11). Under Artuz, state court applications that violate a "condition to filing" are not "properly filed," but state court applications containing claims that violate a "condition to obtaining relief" are "properly filed" nevertheless. Id.

The District Court noted that the Fifth and Ninth Circuits, applying Artuz, hold that untimely state post-conviction petitions may be "properly filed." Pace-2 at *5. Under Fifth and Ninth Circuit law, if the state time limit contains exceptions, and the state courts accept the petition for filing and review it to see if any exception is met, "the [state court] petition, even if untimely, should be regarded as 'properly filed,'" because such a time limit "'does not impose an absolute bar to filing' and is a 'condition to obtaining relief' rather than a 'condition to filing.'" Pace-2 at *5 (quoting Dictado, 244 F.3d at 728-29; citing Smith, 209 F.3d at 384-85).

The District Court found this Fifth and Ninth Circuit law persuasive, applied it to the PCRA time-bar, and held the PCRA time-bar a "condition to obtaining relief" on claims, rather than a "condition to filing" a petition. Pace-2 at *6. The District Court explained:

> [The PCRA time-bar] sets forth strict rules or conditions for obtaining relief under Pennsylvania law. However, this statute is not an absolute bar to filing a second or successive petition more than a year after the conviction became final. The statute contains exceptions that require "some level of judicial review" [Smith, 209 F.3d at 384] to examine the merits of the petition before it can be dismissed as time-barred. ...
>
> Therefore, this court sees [the PCRA time-bar] as imposing conditions for obtaining relief and not as an absolute bar to filing a petition. ... Mr. Pace's second PCRA petition was untimely under Pennsylvania law in that it was too late for him to obtain relief under Pennsylvania law, yet, the PCRA petition was "properly filed" for purposes of federal law and tolled AEDPA's statute of limitations ....

Pace-2 at *6. The District Court therefore found the habeas petition timely.[12]

The District Court also found equitable tolling appropriate, for several reasons.

First, as stated above, Pennsylvania law was unclear when Petitioner sought PCRA relief, and it seemed that relief might be available even if his claims were untimely. In particular, it seemed that relief might be available on an untimely claim if failure to raise the claim earlier resulted from ineffective assistance of counsel, failure to address the claim could create a miscarriage of justice, or the claim challenged an illegal sentence. Petitioner's PCRA petition alleged all of these bar-trumping rules; thus, it was reasonable for him to believe that state court relief might be available. Pace-1 at 594-95; Pace-2 at *9-*12.

Second, the District Court found that if Petitioner had filed a federal habeas petition, rather than his PCRA petition, Third Circuit precedent would have required that the habeas petition be dismissed and Petitioner would have been required to do what he did do – exhaust state remedies through the PCRA. Indeed, the District Judge found that he would have dismissed and required exhaustion in state court if Petitioner had filed a federal habeas petition instead of his PCRA petition. It plainly was reasonable for Petitioner to seek state court remedies at a time when Third Circuit law required that he do so. Pace-1 at 594-95; Pace-2 at *11-*12.

Third, the District Court noted that Petitioner is sentenced to life imprisonment without possibility of parole, an extremely severe sentence, weighing in favor of equitable tolling. Pace-1 at 595; Pace-2 at *12-*13.

Fourth, the District Court found that Petitioner had "diligently and reasonably asserted his claims" throughout all proceedings. Pace-2 at *12.

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[12] The District Court declined to rely on a Third Circuit decision, Fahy v. Horn, 240 F.3d 239 (3d Cir. 2001), which had held that untimely PCRA proceedings are not "properly filed." The District Court noted that Fahy did not cite Artuz and, therefore, did not give "properly filed" the interpretation that Artuz requires. Pace-2 at *8. The District Court also noted that Fahy relied on a pre-Artuz decision of the Ninth Circuit which was vacated and disavowed after Artuz, when the Ninth Circuit decided Dictado, supra. Pace-2 at *8. The District Court therefore concluded that Fahy's holding, untimely-under-state-law = not-"properly-filed," was not binding.

Given these circumstances, the District Court allowed equitable tolling because denial of tolling, and the resulting loss of any federal review, would be "an extraordinary deprivation of rights" and "patently unfair." Pace-1 at 594-95.

Third Circuit: The Commonwealth appealed the District Court's AEDPA timeliness ruling. The Third Circuit reversed, holding that its decision in Merritt v. Blaine, 326 F.3d 159 (3d Cir. 2003), "controls the analysis here" and requires denial of both statutory and equitable tolling. Pace v. Vaughn, 2003 WL 21754982, *1 (3d Cir. July 30, 2003) ("Pace-3").

As to statutory tolling, Merritt held that a PCRA petition that is denied as untimely by the state courts is not "properly filed" under § 2244(d)(2) – i.e., untimely-under-state-law = not-"properly-filed." Merritt explicitly rejected the Fifth and Ninth Circuit law, relied on by the District Court, that finds state post-conviction proceedings "properly filed" under these circumstances. Thus, the Pace panel held, Merritt prohibits statutory tolling here. Pace-3 at *1.

As to equitable tolling, Merritt found that, in "1996, when [Merritt] filed his second pro se PCRA petition, the operation of the PCRA statute of limitations was uncertain" and PCRA relief seemed to be available for untimely claims. Id. at 169. Given the possible existence of PCRA remedies, "it was not unreasonable (indeed it was appropriate) for Merritt to have believed he was required to exhaust his state remedies by filing a second PCRA petition prior to filing a [federal] habeas petition," and Merritt "acted diligently and reasonably when he filed his second PCRA petition rather than filing a habeas petition." Merritt at 168-69. The Third Circuit, however, after finding that Merritt acted "diligently," "reasonably" and "appropriate[ly]" in seeking PCRA relief, still denied equitable tolling because it believed that only death-sentenced prisoners should get equitable tolling under such circumstances. Merritt at 170. Thus, Merritt prohibits equitable tolling here, where Petitioner, like Merritt, acted "diligently and reasonably," Pace-2 at *12, but where Petitioner, like Merritt, is sentenced to life-without-parole rather than death. Pace-3 at *1-*2.

REASONS FOR GRANTING THE WRIT

AEDPA's statute of limitations is tolled during "properly filed" state post-conviction proceedings. 28 U.S.C. § 2244(d)(2). It is undisputed that Petitioner's habeas petition is timely if his PCRA petition was "properly filed." This certiorari petition presents several important issues, which have divided the Courts of Appeal, regarding the meaning of "properly filed."

It is also undisputed that Petitioner's habeas petition is timely if his PCRA proceedings equitably tolled AEDPA's statute of limitations. This Court should grant the writ to resolve important equitable tolling issues and prevent the "patently unfair," "extraordinary deprivation of rights," Pace-1 at 594-95, caused by Third Circuit law.

I. This Court should grant the writ to resolve a conflict between the Courts of Appeal regarding an important question that this Court explicitly reserved in Artuz v. Bennett, 531 U.S. 4 (2000) – whether an untimely state post-conviction petition may be "properly filed" under § 2244(d)(2).

This Court interpreted "properly filed" in Artuz v. Bennett, 531 U.S. 4 (2000). This Court adopted a "broad reading" of "properly filed," Emerson v. Johnson, 243 F.3d 931, 935 (5th Cir. 2001), grounded in the distinction between state court rules that are "conditions to filing" and those that are "conditions to obtaining relief." Artuz, 531 U.S. at 11. If a state post-conviction petition violates a "condition to filing," it is not "properly filed." If the claims in the petition just violate a "condition to obtaining relief," however, the petition is "properly filed" nevertheless. Id. Thus, "whether [a petition] has been 'properly filed' is quite separate from ... whether the claims ... in the [petition] are ... free of procedural bar," and state post-conviction proceedings are "properly filed" even when all of the claims raised in those proceedings are procedurally barred under state law. Id., 531 U.S. at 9.

While Artuz generally held that violation of state court procedural bar rules does not prevent a state post-conviction petition from being "properly filed," there is one type of state court procedural bar rule for which Artuz explicitly declined to address this issue – time limits on state post-conviction proceedings. As to state court time-bars, Artuz stated:

> We express no view on the question whether the existence of certain exceptions to a [state court] timely filing requirement can prevent a late [state court] application from being considered improperly filed. See, e.g., Smith v. Ward, 209 F.3d 383, 385 (C.A.5 2000).

Artuz, 531 U.S. at 8 n.2.

This question that was reserved by Artuz has created a sharp conflict among the Courts of Appeal:

As stated in part A, infra, the Second, Fifth and Ninth Circuits hold that a state post-conviction petition that is untimely under state law is "properly filed" under § 2244(d)(2) if the state court time-bar contains exceptions and the state courts accept the petition for filing and review it to see if an exception is met. See Dictado v. Ducharme, 244 F.3d 724 (9th Cir. 2001); Smith v. Ward, 209 F.3d 383 (5th Cir. 2000); Robinson v. Ricks, 2003 WL 174628 (2d Cir. Jan. 22, 2003) (unpublished, text on Westlaw). Similarly, the Eleventh Circuit holds that a state post-conviction petition is "properly filed" if the state courts accept it for filing and have some discretion to review it on the merits, even if the state courts ultimately deny it as time-barred. See Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003).

As stated in part B, infra, the Third and Seventh Circuits explicitly reject the Second, Fifth, Ninth and Eleventh Circuits' law, and hold that an untimely state post-conviction proceeding is never "properly filed," even when state law requires the state courts to accept the state post-conviction petition for filing and review it to see if any of its claims satisfy an exception to the time-bar. See Merritt v. Blaine, 326 F.3d 159 (3d Cir. 2003); Brooks v. Walls, 301 F.3d 839 (7th Cir. 2002).

This Court should grant the writ to resolve this conflict between the Courts of Appeal on this important matter. See Supreme Court Rule 10(a).

A. The Second, Fifth, Ninth and Eleventh Circuits hold that untimely state post-conviction proceedings can be "properly filed" under § 2244(d)(2).

The Second, Fifth, Ninth and Eleventh Circuits have answered the question this Court reserved in Artuz by holding that untimely state post-conviction proceedings can be "properly filed" under § 2244(d)(2).

In Smith v. Ward, 209 F.3d 383, 384-85 (5th Cir. 2000), the Fifth Circuit held that a Louisiana post-conviction petition that had been held untimely by the state courts was "properly filed" under § 2244(d)(2) because the state courts accepted the petition for filing and reviewed it to determine if it satisfied any exception to the time limit.[13] Because the state courts "accept a prisoner's application for filing and review it to determine whether any of the statutory exceptions to untimely filing are applicable," the state court time-bar "does not impose an absolute bar to filing; instead, it limits the state court's ability to grant relief." Smith, 209 F.3d at 385 (emphasis original). Accordingly, the "state application, although ultimately determined by the state court to be time-barred, nevertheless was 'properly filed,' within the meaning of § 2244(d)(2)." Id.[14]

Similarly, in Dictado v. Ducharme, 244 F.3d 724, 726-28 (9th Cir. 2001), the Ninth Circuit held that a Washington post-conviction petition that had been held untimely by the state courts was nevertheless "properly filed" under § 2244(d)(2) because the state courts accepted the petition and reviewed it to determine if it satisfied any exception to the time limit.[15] Because the state courts allowed the petition to be filed and gave it some review before dismissing it, the state time-bar was "properly regarded as a 'condition to obtaining relief' rather than a 'condition to filing'" and, therefore, the state proceedings were "properly filed" under Artuz. Dictado, 244 F.3d at 728

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[13] The Louisiana time limits at issue in Smith are similar to the PCRA time limits at issue here – a fixed limitation period together with several exceptions for after-discovered evidence, new rules of constitutional law, etc. Compare La.Code Crim. P. art. 930.8A (partially quoted in Smith, 209 F.3d at 385), with, 42 Pa. C.S. § 9545(b).

[14] Smith is a pre-Artuz decision, but it relies on Artuz's distinction between "condition to filing" and "condition to obtaining relief." The Fifth Circuit has held that Smith states the Fifth Circuit's post-Artuz law. Emerson, 243 F.3d at 933.

[15] The Washington time limits in Dictado, see Wa.Rev.Code §§ 10.73.90, 10.73.100 (partially quoted in Dictado at 727-28), like the Louisiana time limits in Smith, are similar to the PCRA time limits.

(quoting Artuz).[16]

The Second Circuit seems to have adopted the Fifth and Ninth Circuits' analysis. See Robinson v. Ricks, 2003 WL 174628 (2d Cir. Jan. 22, 2003) (unpublished, text on Westlaw). In Robinson, the district court applied the Ninth Circuit's Dictado decision and held that state post-conviction proceedings were "properly filed" even though they were untimely under state law, because the state court time limits had exceptions and the state courts accepted the post-conviction submission and reviewed it to see if it met an exception to the time-bar. Robinson v. Ricks, 163 F.Supp.2d 155, 161 (E.D.N.Y. 2001) (citing Artuz; Dictado). The district court held, however, that nothing was "pending" during a gap between lower and upper court filings, and found the habeas petition untimely because the AEDPA time expired without tolling during that gap. Id. at 161-70. The Second Circuit reversed the district court's time-bar ruling, holding that, under Carey v. Saffold, 536 U.S. 214 (2002), the state court proceedings were "pending" during the gap between lower and upper courts. The Second Circuit did not disturb the district court's holding, based on the Ninth Circuit's approach, that the state post-conviction proceedings were "properly filed" even though they were untimely under state law.

The Eleventh Circuit has taken a slightly different approach but reached the same conclusion as the Second, Fifth and Ninth Circuits – untimely state post-conviction proceedings may be "properly filed" under § 2244(d)(2). See Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003). The Eleventh Circuit cited the Fifth Circuit (Smith) and Ninth Circuit (Dictado) decisions with approval, and held that a state post-conviction petition that was time-barred by the state courts was "properly filed" under § 2244(d)(2) because the state courts had discretion to ignore the time bar and reach the merits of the claims, even though they did not actually exercise that discretion to address the merits

[16] Dictado is particularly instructive because the Ninth Circuit first ruled before this Court decided Artuz, and held that a time-barred state post-conviction petition could not be "properly filed." Dictado v. Ducharme, 189 F.3d 889 (9th Cir. 1999). After Artuz, the Ninth Circuit vacated its 1999 Dictado opinion and replaced it with the above-described Dictado opinion, which applied Artuz and found that a time-barred state post-conviction petition was "properly filed."

in that case. See Siebert, 334 F.3d at 1032.

B. The Third and Seventh Circuits hold that all untimely state post-conviction proceedings are per se not "properly filed" under § 2244(d)(2).

The Third and Seventh Circuits have also answered the question that Artuz reserved, but in a way that directly conflicts with, and explicitly rejects, the above-described Second, Fifth, Ninth and Eleventh Circuit law. In the Third and Seventh Circuits, if the state courts hold a state post-conviction petition untimely, it was not "properly filed," even when state law allowed the filing and required the state courts to review the petition to determine if any claims met an exception to the state court time limit. In other words, the Third and Seventh Circuits hold that untimely-under-state-law = not-"properly-filed." See Merritt v. Blaine, 326 F.3d 159 (3d Cir. 2003); Brooks v. Walls, 301 F.3d 839 (7th Cir. 2002).

In Brooks, the Seventh Circuit held that an untimely state post-conviction petition was not "properly filed," even though the petition was accepted for filing by the state courts and state law required the state courts to review it to determine if any claims met an exception to the state court time limit. The Seventh Circuit explicitly rejected the above-described Fifth and Ninth Circuit law, stating: "[D]ecisions such as ... Smith v. Ward, ... and Dictado v. Ducharme, ..., to the extent they hold that petitions untimely under state rules nonetheless may be deemed 'properly filed,' were wrongly decided." Brooks, 301 F.3d at 841.

Third Circuit law is also directly contrary to, and explicitly rejects, Fifth and Ninth Circuit law. In Merritt, the precedent used to deny tolling here, the Third Circuit noted that under Fifth and Ninth Circuit law an untimely PCRA petition (such as that filed by Petitioner here) would be "properly filed" because state law requires the state courts to accept the PCRA petition for filing and review it to see if any claims meet an exception to the PCRA time-bar. See Merritt, 326 F.3d at 164-65 (citing Smith; Dictado); id. at 171 (Rosenn, J., dissenting) (same). The Merritt majority, however, declined to follow Fifth/Ninth Circuit law because it believed itself bound by a prior Third Circuit decision, Fahy v. Horn, 240 F.3d 239 (3d Cir. 2001), which held that "an untimely PCRA

petition does not toll the statute of limitations for a federal habeas corpus petition." Merritt, 326 F.3d at 165. The Merritt dissent noted that the majority's denial of tolling was "in conflict with the well-reasoned opinions of the Fifth and Ninth Circuit[s]" in Smith and Dictado, would have followed the Fifth and Ninth Circuits' approach, and, therefore, would have found the untimely PCRA proceedings "properly filed." Merritt at 171 (Rosenn, J., dissenting).[17]

This Court should grant the writ and resolve this conflict between the Courts of Appeal.

II. This Court should grant the writ to resolve a conflict between the Courts of Appeal regarding whether Carey v. Saffold, 536 U.S. 214 (2002), answered the question about "properly filed" that was reserved in Artuz.

The above-described Third and Seventh Circuit law (untimely-under-state-law = not-"properly-filed") is based in part on those Circuits' misreading of this Court's decision in Carey v. Saffold, 536 U.S. 214 (2002). The Third and Seventh Circuits erroneously hold that Saffold answered the "properly filed" question this Court reserved in Artuz, and that Saffold held that an untimely state post-conviction petition is per se not "properly-filed" under § 2244(d)(2). See part A, infra.

The Second, Fifth, Ninth and Eleventh Circuits disagree with the Third and Seventh Circuits – they correctly recognize that Saffold did not answer (or even ask) the "properly filed" question that Artuz reserved. See part B, infra.

This Court should grant the writ to resolve this conflict between the Courts of Appeal regarding the meaning of Saffold. See Supreme Court Rule 10(a).

[17] In Nara v. Frank, 264 F.3d 310, 316 (3d Cir. 2001), an earlier Third Circuit panel cited the Ninth Circuit's Dictado decision with approval. The Third Circuit, however, has since made clear that it rejects the Ninth Circuit's approach; has limited Nara to its facts; and has stated that it would decide Nara differently if it revisited it today. See Merritt, 326 F.3d at 165-66 nn.6-7; Phillips v. Vaughn, 2003 WL 202472, *2 (3d Cir. Jan. 29, 2003) (unpublished, text on Westlaw).

A. The Third and Seventh Circuits erroneously believe that Saffold decided the "properly filed" issue that Artuz reserved.

The Third and Seventh Circuits erroneously believe that Saffold answered the "properly filed" question that this Court expressly reserved in Artuz. According to the Seventh Circuit:

> The question in Saffold was whether an original petition for collateral relief, filed in the Supreme Court of California, counted as a "properly filed" application given California's unusual system of collateral review. ... Saffold tells us (ending any ambiguity left by Artuz) that to be "properly filed" an application for collateral review in state court must satisfy the state's timeliness requirements.

Brooks, 301 F.3d at 840-41; see also Merritt, 326 F.3d at 166 (similar holding).

The Third and Seventh Circuits are wrong about Saffold, which did not even mention, let alone answer, the "properly filed" question that Artuz reserved. Indeed, Saffold says nothing whatsoever about the meaning of "properly filed."

Saffold did not rule on, discuss, or even mention "properly filed" – the words "properly filed" do not even appear in the Saffold Court's opinion. Saffold considered only the issue of whether state post-conviction proceedings were "pending" during a time-gap between the filing of a California prisoner's trial court post-conviction petition and his filing of an original state habeas petition in the appellate court (California's unusual method for seeking state post-conviction relief), even though there was no document actually filed in any court during that time. Saffold is utterly clear, from beginning to end, that it concerns only the meaning of "pending" under these unusual circumstances, not the meaning of "properly filed."

Saffold began by stating the questions presented, all of which were concerned solely with the meaning of "pending," not "properly filed":

> This case raises three questions related to the statutory word "pending":
>
> (1) Does that word cover the time between a lower state court's decision and the filing of a notice of appeal to a higher state court?
>
> (2) If so, does it apply similarly to California's unique state collateral review system – a system that does not involve a notice of appeal, but rather the filing (within a reasonable time) of a further original state habeas petition in a higher court?

(3) If so, was the petition at issue here (filed in the California Supreme Court 4½ months after the lower state court reached its decision) pending during that period, or was it no longer pending because it failed to comply with state timeliness rules?

Saffold, 536 U.S. at 217; see also id. at 228 (Kennedy, J, dissenting) ("[T]he question in this case: whether an application was pending in the 4-month period between the denial of respondent's habeas petition in the California Court of Appeal and his filing of a new petition in the California Supreme Court.").

Saffold then discussed these questions about "pending" without ever even mentioning the words or concept "properly filed." Thus, Saffold cannot sensibly be said to have held anything about the meaning of "properly filed."

Moreover, it is particularly odd for the Third and Seventh Circuit to assert that Saffold decided the "properly filed" issue reserved by Artuz, because the Saffold opinion does not even cite Artuz. It is utterly implausible that this Court would decide an important issue that it reserved in Artuz without even mentioning Artuz.

It is also clear from the briefs in Saffold that this Court did not address, let alone decide, anything about the meaning of "properly filed." The lower court in Saffold applied Dictado, supra, and unanimously held that the state court proceedings were "properly filed" even if untimely. See Saffold v. Newland, 250 F.3d 1262, 1268 n.8 (9th Cir. 2001); id. at 1269 n.1 (O'Scannlain, J, dissenting). The lower court's "properly filed" holding was not challenged in this Court. Instead, the Saffold briefs were concerned solely with whether anything was "pending" during the gaps between the lower and upper state courts. Indeed, one of the briefs explicitly noted that there was no "properly filed" issue before this Court:

> The Ninth Circuit held that [Saffold's] petition in the California Supreme Court was "properly filed." [citing Saffold v. Newland, 250 F.3d at 1268 n.8]. Amici disagree. An application for relief is not "properly filed" when it is filed outside the time allotted under state rules and is denied [as untimely]. (Amici recognize thus Court left that question open in Artuz v. Bennett, 531 U.S. 4, 8 n.2 (2000).) Because however the issue before this Court is the meaning of the term "pending" this brief assumes arguendo that respondent's petition was "properly filed."

Newland v. Saffold, Brief of the States of North Carolina, et al., as Amici Curiae, 2001 WL 1548793, *3 n.1 (U.S. Nov. 29, 2001).

Saffold plainly did not decide the "properly filed" issue Artuz reserved, and the Third and Seventh Circuit's erred when they held that it did.

B. The Second, Fifth, Ninth and Eleventh Circuits recognize that Saffold did not decide the "properly filed" issue that Artuz reserved.

The Third and Seventh Circuits' misreading of Saffold is at odds with post-Saffold decisions of the Second, Fifth, Ninth and Eleventh Circuits, which recognize that Saffold interpreted "pending," not "properly filed," and did not answer the question this Court left open in Artuz.

The Ninth Circuit, in the Saffold remand, confirmed that Saffold was about the meaning of "pending" during gaps in the state court proceedings, not "properly filed." On remand, the Ninth Circuit found that the California Supreme Court's "lack of diligence" holding referred to Saffold's 5 year delay between direct appeal and filing his post-conviction petition in the lower court, not the 4½ month gap between the lower court and upper courts. Saffold v. Carey, 312 F.3d 1031, 1035 (9th Cir. 2003) ("Saffold-2"). Thus, the proceedings were "pending" during that 4½ month gap. Id.

Significantly, the Ninth Circuit reaffirmed its earlier decision (Saffold v. Newland, 250 F.3d at 1268 n.8, discussed above) that the state post-conviction proceedings were "properly filed" despite being untimely under state law, because the state time limits, like Pennsylvania's, require the state courts to accept the petition and review it for timeliness – they are a "condition to obtaining relief," not a "condition to filing" under Artuz. Saffold-2, 312 F.3d at 1035. Thus, the Ninth Circuit certainly did not believe that this Court decided the "properly filed" issue.

Other post-Saffold Ninth Circuit decisions have reaffirmed that Saffold did not alter the Ninth Circuit's "properly filed" analysis, as described in Dictado, and that untimely state post-conviction petitions are "properly filed" when the state court time limit contains exceptions and the state courts accept petitions for filing and review them to determine if any exception is met. For example, in Jenkins v. Johnson, 330 F.3d 1146, 1150-53 & n.3 (9th Cir. 2003), the court applied

Dictado, held that untimely state post-conviction proceedings were "properly filed" under § 2244(d)(2), and explained that Saffold "did not undermine" Dictado "either intentionally or by implication" because Saffold did not address "properly filed" and, instead, "was making a limited point" about the meaning of "pending" under California's "unusual system." See also id. (Saffold "did not consider whether or not California's timeliness rule was a condition to filing or a condition to obtaining relief [i.e., the 'properly filed' issue], as that issue was not before the Court."); id. at 1156 (O'Scannlain, J. dissenting) (same "properly filed" analysis); Yoshisato v. Terhune, 2003 WL 21153486, *1 (9th Cir. May 16, 2003) (unpublished, text on Westlaw) ("a California state habeas petition that subsequently is denied as untimely due to delay in filing may still be 'properly filed'" (citing Dictado; Saffold-2)); Austin v. Larsen, 2003 WL 21378598, *1 (9th Cir. June 11, 2003) (unpublished, text on Westlaw) ("The district court ruled that Austin's first petition in the state trial court could not begin the tolling of AEDPA because it was held to be untimely by the state court. Our decision in Dictado ..., decided after the district court's ruling, makes clear that a petition dismissed for untimeliness is nevertheless 'properly filed'").

Post-Saffold decisions of the Second, Fifth and Eleventh Circuits similarly recognize that Saffold did not decide anything about the meaning of "properly filed," and, in particular, did not decide the issue reserved by Artuz. After Saffold, as before, untimely state post-conviction proceedings may be "properly filed." See Robinson v. Ricks, 2003 WL 174628 (2d Cir. Jan. 22, 2003) (unpublished, text on Westlaw), and Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003), both discussed above; Robertson v. Cain, 324 F.3d 297, 302 (5th Cir. 2003) (Smith v. Ward's "properly filed" analysis is still Fifth Circuit law post-Saffold).

This Court should grant the writ and resolve this conflict between the Courts of Appeal.

III. This Court should grant the writ because the Third Circuit erred in its resolution of the important issue that this Court reserved in Artuz.

This Court has not decided the statutory tolling issue presented here – can an untimely state post-conviction petition be "properly filed" under § 2244(d)(2)? This Court should grant the writ to decide this important issue. See Supreme Court Rule 10(c). Moreover, this is a particularly apt case in which to grant the writ, because the Third Circuit answered this question erroneously. While Artuz reserved the specific issue presented here, Artuz's analysis shows that Petitioner's PCRA proceedings were "properly filed," and the Third Circuit erred in holding they were not.

A. The Third Circuit defines "properly filed" in a way that was rejected by Artuz, and that is inconsistent with this Court's precedent regarding the importance of habeas corpus.

Artuz rejected the argument that a state court procedural bar ruling makes the state court proceedings not "properly filed" under § 2244(d)(2):

> [The state] contends ... that an application for state postconviction ... review is not "properly filed" ... unless it complies with all mandatory state-law procedural requirements that would bar review of the merits of the application. We disagree.

Artuz, 531 U.S. at 8.

According to the Third Circuit, however: "AEDPA explicitly directs us to toll the statute of limitations only when" the PCRA claims do not violate "the state's procedural requirements." Fahy v. Horn, 240 F.3d 239, 243 (3d Cir. 2001).[18] In particular, because the PCRA time-bar is one of "the state's procedural requirements," the Third Circuit holds that an untimely PCRA petition is not "properly filed." Id.

The Third Circuit's approach was rejected in Artuz. The Third Circuit plainly errs when it says "AEDPA explicitly directs" tolling "only" when the claims do not violate "the state's procedural

[18] This was the holding that was adopted in Merritt and applied here. See Merritt, 326 F.3d at 165-66; Pace-3 at *1.

requirements." Instead, AEDPA "explicitly directs" tolling during "properly filed" state court proceedings, and Artuz held that state court proceedings are "properly filed" when the claims violate "the state's procedural requirements." Thus, the Third Circuit's law (state-procedural-bar = not-"properly-filed") was rejected by Artuz.

The Third Circuit's approach is also inconsistent with this Court's precedent regarding the importance of the writ of habeas corpus, and the need for clear, fair rules governing access to the writ. The Third Circuit makes the "properly-filed"-or-not status of state post-conviction proceedings depend entirely upon the state courts' ultimate ruling – if the state court ultimately deems the claims timely, they were "properly filed" all along; if it ultimately deems them untimely, they were never "proper filed." This outcome-determined approach makes it impossible for petitioners to know ahead of time whether their state court proceedings will ultimately be deemed "properly filed" or not, especially where, as here, state law is unclear at the time of the state court filing.

Because habeas corpus is the "highest safeguard of liberty," Lonchar v. Thomas, 517 U.S. 314, 322 (1996), and "plays a vital role in protecting constitutional rights," Slack v. McDaniel, 529 U.S. 473, 483 (2000), "it is particularly important that any rule that would deprive inmates of all access to the writ should be both clear and fair." Lonchar at 330. The Third Circuit's approach violates this fundamental principle because it denies prisoners all access to federal habeas review simply because they could not predict how the state courts would ultimately rule. The Third Circuit's outcome-determined test cannot be squared with this Court's law.[19]

[19] In the procedural default context, a state court procedural bar ruling may bar federal merits review of individual claims. But procedural default of claims never bars all federal review, as the Third Circuit's approach does. Moreover, procedural default rules do not bar federal merits review at all, even of individual claims, when the state court ruling is not an "adequate and independent state ground" or when the petitioner can establish "cause and prejudice" or a "miscarriage of justice." E.g., Lee v. Kemna, 534 U.S. 362 (2002). The Third Circuit's definition of "properly filed" does not allow such safety valves, and offers no protection from arbitrary, unpredictable state court rulings: under Third Circuit law, if the state court applies a time-bar the federal court must find the

B. Under Artuz's analysis, a PCRA petition that is ultimately deemed untimely by the state courts is "properly filed" under § 2244(d)(2).

As stated above, Artuz's "properly filed" analysis is grounded in the distinction between "conditions to filing" and "conditions to obtaining relief." Id., 531 U.S. at 11. If a state post-conviction petition violates a "condition to filing," it is not "properly filed." If the claims in the petition just violate a "condition to obtaining relief," however, the petition is "properly filed." Here, the state court ultimately used a procedural rule, the PCRA time-bar, to deny Petitioner's claims. Under Artuz's analysis, however, the PCRA time-bar is a "condition to obtaining relief" on claims, not a "condition to filing" the petition.

Artuz gives an example of a typical "condition to filing," violation of which would make a petition not "properly filed": the rule governing filing of successive federal habeas petitions, which requires a would-be petitioner to obtain permission before filing a successive petition. Id. at 10 (citing 28 U.S.C. § 2244(b)(3)(A)). The PCRA time limit is utterly different from Artuz's paradigmatic "condition to filing." A PCRA petitioner does not need permission to file a PCRA petition, even if it is facially untimely. Instead, s/he is entitled to file such a petition, in the same court where any PCRA petition is filed; and the state courts are required to accept such petitions for filing.[20] When a petition is filed, the state courts are required to carefully review it to determine if any claims are timely; if the lower court determines that the claims are untimely, the petitioner is entitled to appellate review of that decision.[21] There is no barrier whatsover to filing and judicial

proceedings not "properly filed."

[20] See 42 Pa. C.S. § 9545(a) (all PCRA petitions filed in Court of Common Pleas); Lovasz v. Vaughn, 134 F.3d 148, 148-49 (3d Cir. 1998) ("While ... the Pennsylvania Supreme Court has announced strict rules [the PCRA time limits] regarding the granting of second and subsequent PCRA petitions, Pennsylvania allows for the filing of second or subsequent PCRA petitions").

[21] E.g., Beasley, 741 A.2d at 1261 ("review[ing] the numerous issues set forth in appellant's brief in an effort to ascertain whether any of those issues" are timely); Commonwealth v. Perry, 716

review – the PCRA time-bar is not a "condition to filing."

The specific facts of this case confirm that the state court rules allow the filing and litigation of a PCRA petition, even if the claims in that petition are ultimately deemed untimely. Here, the state courts allowed Petitioner to file his November 1996 PCRA petition, as they were required to do by state law. Indeed, the Court of Common Pleas appointed counsel to represent Petitioner; gave appointed counsel an opportunity to amend and brief the PCRA petition; and decided the claims on the merits, rather than on the basis of a PCRA time-bar. Similarly, the Superior Court allowed Petitioner to appeal the denial of PCRA relief, as it was required to do under state law; and the Pennsylvania Supreme Court allowed him to seek review of the Superior Court's decision, as it was required to do under state law. Of course, the Superior Court ultimately denied Petitioner's claims as untimely – it applied the PCRA time-bar as a "condition to obtaining relief" – and the Pennsylvania Supreme Court left that ruling undisturbed. This ultimate outcome, however, does not alter the fact that Petitioner was allowed to file and litigate the proceedings, and was afforded judicial review. The PCRA time-bar is not a "condition to filing."

The PCRA time-bar's status as a "condition to obtaining relief" on claims, rather than a "condition to filing" a petition, is also apparent from the fact that PCRA timeliness vel non is decided on a claim-by-claim basis – a PCRA petition filed outside the general one year limit may

A.2d 1259, 1260-61 (Pa. Super. 1998) (state courts must conduct "thorough review" of PCRA petition to determine if any claims are timely; petitioner has right to appellate review of untimeliness ruling); Commonwealth v. Austin, 721 A.2d 375, 377 (Pa. Super. 1998) (same); Commonwealth v. Ferguson, 722 A.2d 177, 178 (Pa. Super. 1998) (same); see also Commonwealth v. Smith, 818 A.2d 494, 498-501 (Pa. 2003) (first time petitioner entitled to appointment of counsel and counseled amendment of petition even where petition is facially untimely); Commonwealth v. Perez, 799 A.2d 848, 851 (Pa. Super. 2002) (same); Commonwealth v. Guthrie, 749 A.2d 502, 504 (Pa. Super. 2000) (same); Ferguson, 722 A.2d at 179-80 (same).

contain both timely and untimely claims.[22] As Artuz explains, section 2244(d)(2) "refers only to 'properly filed' applications and does not contain the peculiar suggestion that a single application can be both 'properly filed' and not 'properly filed'" because some claims in the application are timely and others are not. Artuz at 10. Since a PCRA petition may contain both timely and untimely claims, the PCRA time-bar is a "condition to obtaining relief" on claims, not a "condition to filing" the petition.

Under Artuz's analysis, Petitioner's PCRA petition was "properly filed." This Court should grant the writ to conform the Third Circuit's law to this Court's precedent.

IV. This Court should grant the writ and review the Third Circuit's denial of equitable tolling, which denies all federal habeas review to petitioners who act "appropriately," "reasonably" and "diligently," and as demanded by the exhaustion requirement, in seeking state court remedies.

The Third Circuit's erroneous approach to statutory tolling (described above) is particularly unfair because it is combined with an extraordinarily harsh approach to equitable tolling, which denies equitable tolling in cases, like this, where the petitioner acted "appropriately," "diligently," and "reasonably" in seeking state court remedies at a time when they appeared to be available, and when seeking such state court remedies was required by the exhaustion requirement. See Pace-2 at *11-*12 (Petitioner "diligently and reasonably asserted his claims"; if Petitioner had tried to file a

[22] E.g., Commonwealth v. Morris, 822 A.2d 684, 695-99 (Pa. 2003) (four claims decided on merits; four claims denied as untimely; two claims denied on the merits and as untimely; one claim denied on procedural grounds other than time-bar); Commonwealth v. Abdul-Salaam, 812 A.2d 497, 502-04 (Pa. 2002) (three claims decided on merits; one claim denied as untimely; one claim denied on procedural grounds other than time-bar); Commonwealth v. Lark, 746 A.2d 585, 588-91 (Pa. 2000) (two claims decided on merits; three claims denied as untimely); Commonwealth v. Cross, 726 A.2d 333, 335-37 (Pa. 1999) (one claim decided on merits; three claims denied as untimely); Beasley, 741 A.2d at 1261 ("review[ing] the numerous issues set forth in appellant's brief in an effort to ascertain whether any of those issues" are timely). This claim-by-claim approach to timeliness is required by the PCRA's statutory language, which inquires separately about timeliness of each "claim" raised or "right asserted," whenever the petition is filed outside the general one year period. 42 Pa. C.S. § 9545(b)(1)-(2).

habeas petition instead of a PCRA petition, the habeas petition would have been dismissed and he would have been required to file the PCRA petition); Merritt, 326 F.3d at 168-69 (denying equitable tolling where "it was not unreasonable (indeed it was appropriate) for Merritt to have believed he was required to exhaust his state remedies by filing a second PCRA petition prior to filing a [federal] habeas petition," and he "acted diligently and reasonably when he filed his second PCRA petition rather than filing a habeas petition").

The Third Circuit's erroneous statutory tolling law makes the habeas petitioner's ability to obtain any federal review completely dependent on the state courts' ultimate ruling – if the state court ultimately deems the claims timely, they were "properly filed" all along; if it ultimately deems them untimely, they were never "proper filed." In the interest of fundamental fairness, a court that adopts such an outcome-determined approach to statutory tolling should at least couple it with an equitable tolling analysis that allows tolling when the ultimate outcome is not clear at the time the petitioner originally seeks state court remedies. The Third Circuit, however, has not done so. Instead, it denies equitable tolling where, as here, the petitioner acts diligently, reasonably and appropriately in seeking state court remedies when those remedies appear to be available, and when pursuit of those remedies is actually required by the exhaustion requirement. This result is Kafkaesque – the petitioner does everything reasonably and as required by current law, and then is thrown out of court. A proper equitable tolling analysis requires equitable tolling here, for the following reasons.

1. As stated above, when Petitioner filed his PCRA petition, it seemed that the state courts would give merits review even if his claims were untimely under the PCRA's statutory language. The state courts had a long tradition of disregarding the PCRA's statutory bar rules when the petitioner alleged, as Petitioner did here, ineffective assistance of counsel, miscarriage of justice, and/or illegality of sentence; it was reasonable to believe the state courts would continue to apply

these bar-trumping rules; in particular, it was reasonable to believe they would trump the PCRA time-bar. Ultimately, the state courts abandoned their traditional anti-bar rules, strictly applied the PCRA time-bar, and denied Petitioner's claims as untimely. That change in state law, however, occurred long after Petitioner filed his PCRA petition. See Statement of the Case, supra.

Under these circumstances, where Petitioner diligently sought relief in a forum (state court) that reasonably appeared to be available, where he sought that relief within the AEDPA year, and where he only later found that relief was not available after all, this Court and the Courts of Appeals generally allow equitable tolling.[23] Similarly, equitable tolling should be allowed here.

2. Because state court remedies appeared to be available to Petitioner, federal law required him to pursue those state court remedies, by filing a PCRA petition, before filing a federal habeas petition. The Third Circuit requires Pennsylvania prisoners to file PCRA petitions and exhaust state court remedies if there is any possibility of state court merits review.[24] Applying this law, the Third Circuit and District Courts in Pennsylvania, from September 1996 through December

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[23] E.g., Burnett v. New York Central R. Co., 380 U.S. 424, 430 (1965) (equitable tolling to avoid "unfairness of barring ... action solely because a prior timely action is dismissed for improper venue after the applicable statute of limitations has run"); Clymore v. United States, 217 F.3d 370, 376 (5th Cir. 2000) (equitable tolling where litigant filed in wrong venue and statute of limitations expired during wrong venue litigation; "Given (1) the uncertainty of the law regarding the proper venue in which to file and (2) the government's awareness [that Clymore was seeking relief], the limitations period should be equitably tolled."); Doherty v. Teamsters Pension Trust Fund, 16 F.3d 1386, 1393 n.7 (3d Cir. 1994) (when there are "uncertainties about the law" regarding forum where claims should be filed, equitable tolling avoids "penaliz[ing] litigants for having made questionable procedural choices of fora"); Husch v. Szabo Food Service Co., 851 F.2d 999, 1003-04 (7th Cir. 1988) (equitable tolling where plaintiff filed claims in wrong forum because of "confusing" law); see also Young v. United States, 535 U.S. 43, 50 (2002) ("This Court has permitted equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period" (internal quotation marks omitted)).

[24] Lovasz, 134 F.3d at 148 (exhaustion required "unless state law 'clearly foreclose[s]'" merits review (quoting Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993))); Doctor, 96 F.3d at 683 (exhaustion required unless federal court is "certain that state review is clearly foreclosed").

1998, consistently required Pennsylvania prisoners to seek PCRA remedies before seeking federal habeas review even when their claims seemed to be time-barred by the PCRA's statutory language, because the above-described state law suggested that state court merits review might be available.[25]

In compliance with Third Circuit exhaustion law at the time, Petitioner filed his PCRA petition to exhaust seemingly available state court remedies before filing his federal habeas petition. If Petitioner had instead filed a federal habeas petition, Third Circuit law would have required that it be dismissed for lack of exhaustion. Indeed, the District Judge here expressly found that if Petitioner had tried to file a federal habeas petition, rather than the PCRA petition that he did file, the federal habeas petition "would have been dismissed" and Petitioner would have been required to do what he did do – file a PCRA petition to exhaust state remedies before seeking federal review.

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[25] E.g., Lambert v. Blackwell, 134 F.3d 506, 520-24 (3d Cir. 1998) (requiring exhaustion of PCRA remedies where claims were time-barred by PCRA's statutory language; while a "literal reading of [the PCRA time-bar] indicate[d]" that the claims were untimely, a "literal reading" of the statute was not dispositive because Pennsylvania's courts had long "expressed a willingness to depart from the PCRA's stringent [statutory] waiver standards" based on allegations of miscarriage of justice, ineffective assistance of counsel, or other "manifest injustice"); Doctor v. Walters, 96 F.3d 675, 681-83 (3d Cir. 1996) (requiring exhaustion of PCRA remedies where claims were time-barred by the PCRA's statutory language, because petitioner's claimed Sixth Amendment violation could establish a "miscarriage of justice" as defined in Pennsylvania and, thus, trump the PCRA's statutory bars); Blasi v. Attorney General, 30 F.Supp.2d 481, 487-88 (E.D. Pa. Dec. 17, 1998) (requiring exhaustion of claims that were untimely under the PCRA because PCRA time-bar and other statutory bars may be trumped by miscarriage of justice and/or ineffective assistance of counsel); Williams v. Vaughn, 3 F.Supp.2d 567, 573-74 (E.D. Pa. March 18, 1998) (same); Morris v. Horn, 1998 WL 150956, *2-*3 (E.D. Pa. March 19, 1998) (same); Hammock v. Vaughn, 1998 WL 163194, *5-*6 (E.D. Pa. April 7, 1998) (same); Peterkin v. Brennan, 1998 WL 470139, *5-*6 (E.D. Pa. Aug. 11, 1998) (same); Crawley v. Horn, 7 F.Supp.2d 587, 588 (E.D. Pa. June 11, 1998) (requiring exhaustion of claims that were untimely under the PCRA because miscarriage of justice might trump time-bar); Peterkin v. Horn, 30 F.Supp.2d 513, 519-20 (E.D. Pa. Dec. 15, 1998) (same); Weakland v. White, 1997 WL 799433, *3 (E.D. Pa. Dec. 29, 1997) (same); Belle v. Stepanik, 1996 WL 663872, *4-*8 & n.5 (E.D. Pa. Nov. 14, 1996) (because "miscarriage of justice" exception to waiver not based on PCRA's statutory language, the 1996 PCRA "amendments probably do not eliminate the ... miscarriage of justice exception")

Pace-1 at 594; Pace-2 at *11-*12.[26]

Under these circumstances, where Petitioner's state court filing was required by Third Circuit and district court precedent regarding exhaustion of state remedies, denial of tolling during the state court proceedings simply cannot be correct. As the District Court found, it is "an extraordinary deprivation of rights" and "patently unfair" for the habeas courts to now deem Petitioner time-barred under AEDPA for doing what he was required to do by Third Circuit exhaustion law – exhaust state remedies before pursuing federal review. Pace-1 at 594-95. Equitable tolling is plainly appropriate.[27]

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[26] In Merritt, 326 F.3d at 169, the Third Circuit suggested that applicability of the PCRA time-bar "became clear" in December 1997, when Superior Court panels decided Alcorn and Conway (see discussion of these cases in Statement of the Case, supra). But Alcorn and Conway did not make state law "clear." As decisions of Pennsylvania's intermediate appellate court, they could not make state law clear, since they were not the last word on questions of state law. Moreover, they left open the possibility that the traditional court-made anti-bar rules (miscarriage of justice, ineffective assistance of counsel, illegal sentence) would overcome the PCRA time-bar – Conway assumed that an illegal sentence claim, such as that raised by Petitioner, would trump the time-bar. Any suggestion that Alcorn and Conway made state law clear is also contrary to numerous Third Circuit and district court decisions, post-dating Alcorn and Conway, holding that the traditional anti-bar rules might trump the time-bar and requiring petitioners to seek PCRA remedies on facially untimely claims. See supra. Finally, even if Conway and Alcorn had made state law clear, Petitioner started the exhaustion process long before they were decided, and had to present his claims to all levels of the state courts to avoid a federal court procedural default ruling. See O'Sullivan v. Boerckel, 526 U.S. 838 (1999).

[27] The Third Circuit admits that denial of tolling under these circumstances "create[s] a tension" between AEDPA's time limits and "the need to exhaust state remedies." Merritt, 326 F.3d at 170 n.10. The Third Circuit suggested that habeas courts could "ameliorate" this problem by holding federal proceedings in suspense while state remedies are exhausted, but noted that "this procedure would be inapplicable" to Petitioner because he "chose to file his petition in state court rather than in federal court." Id. But it is grossly unfair to penalize Petitioner for not seeking "suspense" from the District Court before exhausting state remedies. At the time that Petitioner was litigating his PCRA petition, the Third Circuit did not allow district courts to hold federal habeas proceedings in suspense during exhaustion – Third Circuit law required that mixed habeas petitions be dismissed. See Christy v. Horn, 115 F.3d 201 (3d Cir. 1997); Baker v. Horn, 210 F.Supp.2d 592, 607 (E.D. Pa. 2002); Crawley, 7 F.Supp.2d at 589; Williams v. Vaughn, 1998 WL 238466, *2 n.3 (E.D. Pa.). Thus, if Petitioner had filed a federal petition before exhausting state remedies, it would

3. Petitioner's pro se status, indigence, and imprisonment also support equitable tolling. Petitioner was unrepresented, indigent and imprisoned from the time that his first state post-conviction proceedings were completed in 1992 until after he filed his pro se PCRA petition in 1996. The Court of Common Pleas appointed counsel to represent him in the PCRA proceedings, but counsel withdrew when the Court of Common Pleas denied relief. Petitioner then continued pro se through Pennsylvania's Superior and Supreme Courts, and filed pro se in the District Court.[28] These circumstances – where an indigent, imprisoned, unrepresented petitioner diligently tried to present his claims in the face of confusing law – support equitable tolling.[29]

4. As the District Court found, Petitioner's "extremely grave" and "severe" sentence (life-without-possibility-of-parole imposed on a 17 year old) also supports equitable tolling. Pace-1 at 595; Pace-2 at *13.[30]

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have been dismissed, and he would be in exactly the same posture he is in now – in need of tolling.

[28] The District Court first appointed counsel to represent Petitioner after the Commonwealth sought reconsideration of the Pace-1 District Court ruling.

[29] Estelle v. Gamble, 429 U.S. 97, 106 (1976) (pro se litigant "held to less stringent standards"); United States v. Miller, 197 F.3d 644, 650-51 (3d Cir. 1999) (habeas courts should be "pro-se-petitioner-friendly"; should be careful to protect pro se prisoners from AEDPA's "trap[s] for unwary petitioners"; and, in support of these goals, should require that AEDPA's "statute of limitations ... be tolled, as fairness demands"), cited with approval in Castro v. United States, 124 S.Ct. 786, 792 (2003); Kocian v. Getty Refining & Marketing Co., 707 F.2d 748, 755 (3d Cir. 1983) ("equitable tolling is particularly appropriate in cases involving lay persons" and "complex[]" procedures (citations omitted)); Hart v. J.T. Baker Chemical Co., 598 F.2d 829, 832 (3d Cir. 1979) (courts should be "flexible ... when reviewing failures by [pro se litigants] to comply with procedural technicalities"); see also Commonwealth v. Smith, 818 A.2d 494, 501 (Pa. 2003) (unrepresented prisoners may "not know of the necessity of demonstrating the existence of an exception to the [PCRA] time-bar" because, inter alia, the PCRA form petition provided to them, and which they are "required to fill out, does not reference the PCRA's time limitation").

[30] See Solem v. Helm, 463 U.S. 277, 297 (1983) (life without parole "is far more severe" than life with parole; "[o]nly capital punishment ... exceeds it" in severity); Joseph Bancroft & Sons Co. v. Shelley Knitting Mills, Inc., 268 F.2d 569, 574 (3d Cir. 1959) (equitable powers guided by severity of "possible injuries" to parties).

5. Equitable tolling is also appropriate because the Commonwealth misled Petitioner about the PCRA time-bar. The Commonwealth gives prisoners a standard PCRA form petition; unrepresented prisoners, at least those, like Petitioner, whose convictions are in Philadelphia, must use this form to file a pro se PCRA petition. Commonwealth v. Duffey, 713 A.2d 63, 66 (Pa. 1998); Smith, 818 A.2d at 501. When the PCRA was amended in January 1996, and the time-limits were added to the statute, the form that is provided to prisoners was not changed to reflect the amendments. Smith, 818 A.2d at 501; Commonwealth v. Palmer, 814 A.2d 700, 702 nn.2-3 (Pa. Super. 2002). In particular, the "standard PCRA petition form that is extensively used by inmates in Philadelphia, and which [Philadelphia-convicted prisoners] w[ere] required to fill out, does not reference the PCRA's time limitation mandate." Smith, 818 A.2d at 501. The Commonwealth, by providing this form to prisoners and requiring them to use it, thus misled them into believing that they might not have to comply with the PCRA time limits, thus supporting equitable tolling.[31]

6. Equitable tolling is particularly appropriate here, where failure to toll results in complete denial of all federal habeas review. Because habeas corpus is the "highest safeguard of liberty," Lonchar, 517 U.S. at 322, and "plays a vital role in protecting constitutional rights," Slack, 529 U.S. at 483, "it is particularly important that any rule that would deprive inmates of all access to the writ should be both clear and fair." Lonchar at 330. Here, where it was not clear that the state courts would ultimately deem Petitioner's claims untimely and where Third Circuit exhaustion law required Petitioner to seek state court review before filing a federal habeas petition, AEDPA's

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[31] E.g., Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984) (equitable tolling where "defendant lulled the plaintiff into inaction"); Miller v. Beneficial Management Corp., 977 F.2d 834, 845 (3d Cir. 1992) (equitable tolling where defendant's "acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights"); Miklavic v. USAir, Inc., 21 F.3d 551, 557 (3d Cir. 1994) (defendant's conduct which "lulled the [plaintiff] into a false sense of security" may be grounds for equitable tolling); Gray v. Phillips Petroleum Co., 858 F.2d 610, 615-16 (10th Cir. 1988) (equitable tolling where "plaintiff has been lulled into inaction by [the defendant], state or federal agencies, or the courts" (citations omitted)).

limitations period should be tolled.

7. As the District Court found, under these circumstances the Third Circuit's denial of any tolling, and the resulting loss of any federal review, is "an extraordinary deprivation of rights" and "patently unfair." Pace-1 at 594-95. Equitable tolling should be allowed.

CONCLUSION

For the reasons stated above this Court should grant the writ and review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Counsel for Petitioner, John Pace

Dated: March 4, 2004

CERTIFICATE OF SERVICE

I, BILLY H. NOLAS, certify that on this 4th day of March, 2004, I have caused the foregoing petition to be served by FIRST CLASS MAIL on the following person:

Thomas Dolgenos
Office of the Philadelphia District Attorney
1421 Arch Street
Philadelphia, Pennsylvania, 19102

BILLY H. NOLAS

H

This case was not selected for publication in the Federal Reporter.

NOT PRECEDENTIAL

Please use FIND to look at the applicable circuit court rule before citing this opinion. Third Circuit Local Appellate Rule 28.3(a) and Internal Operating Procedure 5.3. (FIND CTA3 Rule 28.0 and CTA3 IOP APP I 5.3.)

United States Court of Appeals,
Third Circuit.

John A. **PACE**
v.
Donald **VAUGHN**; the District Attorney of the County of Philadelphia; the Attorney General of the State of Pennsylvania,
Appellants

No. 02-3049.

Submitted Under Third Circuit LAR 34.1(a) July 7, 2003.
Decided July 30, 2003.

State prisoner who was convicted of murder petitioned for writ of habeas corpus. The United States District Court for the Eastern District of Pennsylvania, 151 F.Supp.2d 586, rejected report and recommendation of United States Magistrate that the petition be dismissed as time-barred, finding instead that the federal habeas limitations period was statutorily and equitably tolled. The state appealed. The Court of Appeals, Nygaard, Circuit Judge, held that: (1) petitioner's state postconviction relief petition was not properly filed as required to statutorily toll the federal habeas limitations period, and (2) uncertainty under state law as to the time limit for filing a state postconviction relief petition was not an extraordinary circumstance so as to warrant equitable tolling of the federal habeas limitations period, in the case of a mandatory life sentence without the possibility of parole.

Reversed.

West Headnotes

[1] Habeas Corpus ⇐603
197k603

Federal habeas court was bound by state court's finding that state postconviction relief petitioner's second state postconviction relief petition was untimely, and thus, petitioner's state petition was not properly filed as required to statutorily toll the federal habeas limitations period. 28 U.S.C.A. § 2244(d)(2).

[2] Habeas Corpus ⇐603
197k603

Uncertainty under state law as to the time limit for filing a state postconviction relief petition was not an extraordinary circumstance so as to warrant equitable tolling of the federal habeas limitations period, in the case of a mandatory life sentence without the possibility of parole, especially where petitioner did not act promptly after state law as to the time bar for postconviction relief became clear. 28 U.S.C.A. § 2244(d).

***128** On Appeal from the United States District Court for the Eastern District of Pennsylvania. (D.C. Civil No. 99-cv-06568). District Judge: The Honorable James T. Giles.

Before NYGAARD, SMITH, and GREENBERG, Circuit Judges.

OPINION OF THE COURT

NYGAARD, Circuit Judge.

****1** In this case, the Commonwealth of Pennsylvania argues that the District Court erred by both statutorily and equitably tolling the statute of limitations for the federal habeas corpus petition of appellee John Pace under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d)(2), during the period of time Pace was pursuing post conviction relief in state court under the Pennsylvania Post Conviction Relief Act, 42 Pa. Cons.Stat. Ann. §§ 9541-9546 (1998) (PCRA). At issue is whether Pace's application for state post-conviction relief was "properly filed" under 28 U.S.C. § 2244(d)(2). We hold that our recent case, *Merritt v. Blaine*, 326 F.3d 157 (3d Cir.2003), controls the analysis here, and because we find that the application was not properly filed and that equitable tolling was not justified, we will reverse the District Court.

I.

The one-year limitation of the AEDPA is statutorily tolled for the "time during which a properly filed

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application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). Pace's petition was statutorily tolled only if his petition for state post-conviction review was both pending and "properly filed." *Merritt*, 326 F.3d at 162. In *Merritt*, which was decided after Judge Giles issued his opinion, we analyzed our decision in *Fahy v. Horn*, 240 F.3d 239 (3d Cir.2001):

> We held in *Fahy* that an untimely PCRA petition does not toll the statute of limitations for a federal habeas corpus petition.... In *Fahy*, we noted that when applying AEDPA, 'we must look to state law governing when a petition for collateral relief is properly filed' and 'defer to a state's highest court when it rules on an issue.' Consequently, just as in *Fahy*, we must defer to the state court's holding that Merritt's PCRA petition was untimely and it follows that it was not 'properly filed' under AEDPA.

Id. at 165-66 (citations omitted). Because the highest state court had held that Merritt's PCRA petition was untimely, it was not "properly filed" under AEDPA.

[1] We do not see any material distinctions between our treatment of Merritt's *pro se* second PCRA petition and Pace's. We are therefore bound by the state court's finding that Pace's second PCRA petition was untimely, and we must reverse the District Court's order holding that Pace's second PCRA petition was tolled by the statute.

II.

The general requirements for equitable tolling are that (1) the petitioner has established that he has been prevented from ***129** asserting his rights "in some extraordinary way," and (2) the petitioner has demonstrated that he "exercised reasonable diligence in investigating and bringing [the] claims." *Id.* at 168 (citations omitted).

[2] The Commonwealth contends that, contrary to the determination of the District Court, the lack of certainty as to how Pennsylvania courts would interpret the PCRA is not an "extraordinary" circumstance. We agree. In *Merritt*, we explained:

> ****2** We recognized that in 1997, when Fahy's PCRA petition was filed, the newly established PCRA time limit was 'unclear' and 'inhibitively opaque.' Indeed, we stated that based on that uncertainty, Fahy 'reasonably believed that the state petition was properly filed.' However ... in *Fahy* we 'did not hold that this lack of clarity in Pennsylvania law constituted extraordinary circumstances.' In fact, we stated that 'in non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling.' Instead of finding extraordinary circumstances, we based our decision to apply equitable tolling in *Fahy* on the accepted principle that 'death is different.' ... This case is similar to *Fahy*.... [I]t was not unreasonable (indeed it was appropriate) for Merritt to have believed he was required to exhaust his state remedies by filing a second PCRA petition prior to filing a habeas petition in federal court.... Although Merritt faces the grave penalty of mandatory life sentence without the possibility of parole, we cannot apply the rationale of *Fahy* to Merritt's situation without violating our tradition of avoiding intracircuit conflict of precedent.

Merritt, 326 F.3d at 169-70 (citations omitted). *Merritt* established that the uncertain PCRA time limit is not an "extraordinary" circumstance in the case of mandatory life sentence without the possibility of parole. In addition, the *Merritt* panel held that because Merritt did not act promptly after the decisions of the Pennsylvania Superior Court in 1997, [FN1] at which point "Pennsylvania law as to the time bar of the PCRA became clear," there was no basis to find Merritt's habeas petition timely under the doctrine of equitable estoppel. This case is on all fours with *Merritt*. We therefore conclude that there are no extraordinary circumstances that would allow for equitable tolling.

FN1. *See Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa.Super.Ct.1997); *Commonwealth v. Conway*, 706 A.2d 1243 (Pa.Super.Ct.1997).

III.

In conclusion, we hold that there is no basis to find Pace's habeas petition timely, either under the statute or under the doctrine of equitable estoppel. Indeed, Pace himself concedes that "*Merritt* is materially indistinguishable from *Pace* and, thus, *Merritt*' s denial of both statutory and equitable tolling would apply here." Appellee's Supp. Br. Re: *Merritt*, at 1. Based on the foregoing, we will reverse the District Court, and dismiss Pace's petition for habeas corpus as time-barred under the AEDPA.

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71 Fed.Appx. 127, 2003 WL 21754982 (3rd Cir.(Pa.))

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THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3049

JOHN A. PACE

v.

DONALD VAUGHN; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA;
THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Appellants

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(Dist. Ct. No. 99-cv-06568)

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, Chief Judge,
SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, BARRY,
AMBRO, FUENTES, SMITH, CHERTOFF, and GREENBERG, Circuit Judges[1]

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is

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[1]Judge Greenberg's vote is limited to panel rehearing only.

Sincerely: BN, DW, JG

hereby DENIED.

It is so ordered.

By the Court,

United States Circuit Judge

DATE: OCT -6 2003

United States District Court,
E.D. Pennsylvania.

John A. **PACE**
v.
Donald **VAUGHN**, et al.

No. CIV.A. 99-6568.

June 7, 2001.

Following conviction for possession of instrument of crime and second-degree murder, inmate filed two petitions for post-conviction relief under state law, and later filed federal habeas petition. United States Magistrate Judge M. Faith Angell recommended that the petition be dismissed as time-barred under the Antiterrorism and Effective Death Penalty Act (AEDPA), and inmate objected to report and recommendation. The District Court, Giles, Chief Judge, held that: (1) Pennsylvania Post Conviction Relief Act (PCRA) petition for post- conviction relief was "properly filed," and thus, tolled AEDPA's statute of limitations, where state petition abided by all of Pennsylvania's clear and well established procedural requirements at time it was filed, even though state law was subsequently established that resulted in state court dismissing the petition as time-barred, and (2) AEDPA statute of limitations could be equitably tolled under the circumstances.

So ordered.

West Headnotes

[1] Habeas Corpus ⇐603
197k603

Pennsylvania Post Conviction Relief Act (PCRA) petition for post-conviction relief was "properly filed," and thus, tolled the federal Antiterrorism and Effective Death Penalty Act's (AEDPA's) statute of limitations for filing a federal habeas petition, where state petition abided by all of Pennsylvania's clear and well established procedural requirements at time it was filed, even though state law was subsequently established that resulted in state court dismissing the petition as time-barred. 28 U.S.C.A. § 2244(d)(1); 42 Pa.C.S.A. § 9545.

[2] Habeas Corpus ⇐603
197k603

Antiterrorism and Effective Death Penalty Act's (AEDPA's) statute of limitations is tolled while a "properly filed" post-collateral relief petition is pending in state court; in this regard, application is "filed" when it is delivered to, and accepted by, the appropriate court officer for placement into the official record, and application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings, which typically prescribe such things as the form of the document, time limits upon its delivery, court and office in which it must be lodged, and the filing fee. 28 U.S.C.A. § 2244(d)(1).

[3] Habeas Corpus ⇐603
197k603

Pennsylvania Post Conviction Relief Act (PCRA) petition is "properly filed" in Pennsylvania, for purposes of tolling Antiterrorism and Effective Death Penalty Act's (AEDPA's) statute of limitations, when it is delivered and accepted in accordance with applicable Pennsylvania laws and rules. 28 U.S.C.A. § 2244(d)(1); 42 Pa.C.S.A. § 9545.

[4] Habeas Corpus ⇐603
197k603

If state allows petitioners to file second or subsequent petitions for post- conviction relief, federal courts should not undermine state's decision by refusing to toll the one-year period of limitation of the Antiterrorism and Effective Death Penalty Act (AEDPA) if a second or subsequent petition is pending in the state court system. 28 U.S.C.A. § 2244(d)(1).

[5] Habeas Corpus ⇐603
197k603

State prisoner was entitled to tolling of statute of limitations under the Antiterrorism and Effective Death Penalty Act (AEDPA) with regard to his federal habeas petition, where his state petition was filed at time when a habeas petition, if filed in federal court, would have been dismissed for failure to exhaust state remedies. 28 U.S.C.A. § 2244(d)(1).

[6] Habeas Corpus ⇐603
197k603

State inmate was entitled to equitable tolling of one-year statute of limitations under the Antiterrorism and

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Effective Death Penalty Act (AEDPA), even if he did not timely file his federal habeas petition, where strict adherence to statute of limitations would be unfair, in that inmate exercised reasonable diligence in bringing his claims, and if he would have filed federal petition timely, it would have been dismissed for failure to exhaust state remedies, given that his Pennsylvania Post Conviction Relief Act (PCRA) petition was still pending at that time. 28 U.S.C.A. § 2244(d)(1); 42 Pa.C.S.A. § 9545.

***587** John A. Pace, Graterford, PA, Pro se.

Thomas W. Dolgenos, District Attorney's Office, Donna G. Zucker, John W. Goldsborough, Office of the District Attorney, Assistant District Attorney, Philadelphia, PA, for Respondents.

Memorandum

GILES, Chief Judge.

Factual and Procedural History

I. Petitioner's Requests for Collateral Relief.

On February 13, 1986, Petitioner pled guilty before the Honorable David N. Savitt of the Court of Common Pleas of Philadelphia County to the charges of possession of an instrument of crime and the second-degree murder of Randolph Baldwin. Judge Savitt sentenced Petitioner, who was then seventeen years old, to life imprisonment without the possibility of parole. Petitioner did not file a motion to withdraw his guilty plea, and he did not file a direct appeal.

However, six months later on August 21, 1986, Petitioner filed a *pro se* petition under the Pennsylvania Post Conviction Hearing Act ["PCHA"], 42 Pa.C.S.A § 9541, *et seq.* Through appointed counsel, Petitioner eventually filed an amended petition claiming both ineffective assistance of trial counsel and trial court error. The Commonwealth moved to dismiss the amended PCHA petition. The PCHA court granted that motion on July 23, 1991. On March 30, 1992, the Superior Court affirmed the PCHA court's decision. The Supreme Court of Pennsylvania denied Allocatur on September 2, 1992.

On November 27, 1996, Petitioner filed a second request for collateral relief under the Pennsylvania Post Conviction Relief Act ["PCRA"], which replaced the PCHA in 1988. When Petitioner filed the PCRA petition, the Act had recently been amended. The amendments, which were enacted on January 16, 1996, placed new time limits on PCRA petitions. The relevant part of the limitation follows:

> (b) Time for filing petition.--
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
> (i) the failure to raise the claim previously was the result of interference by ***588** government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S.A. § 9545.

II. The Timeliness of the Petitioner's PCRA Petition was Uncertain Based on the Statutory Language and Legislative Note.

Section 9545 of the PCRA states that a petition must be filed within one year of the date that a petitioner's conviction became final, unless the petition falls within one of the enumerated exceptions. At the time Petitioner filed his PCRA petition in November 1996, his conviction had become final over ten years before, and his petition did not claim any of the statutory exceptions to the one year time limit. Since Petitioner's conviction occurred prior to the enactment of the PCRA amendments, it could not have been clear how, if at all, the amendments would apply to the petition when it was filed in November, 1996. The 1995 PCRA amendments had been accompanied by a Note about legislative intent. It stated that "a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition under 42 Pa.C.S. Ch. 95 Subch. B if the petitioner's first petition is filed within one year of the effective date of the act." The Note did not clarify whether petitioners with pre-1996 final convictions, who filed second or successive petitions, but who were filing their first petition since the amendment, had one year after the enactment of the act to file a collateral relief petition.

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III. Opinions from Federal District Courts Reflected the Fact that the Timeliness of Petitioner's PCRA Petition was Uncertain when it was Filed.

When Petitioner filed his PCRA petition in November 1996, it was not then known how the Pennsylvania state courts would apply the above quoted provision. No Pennsylvania state court opinion had been rendered interpreting it. As of September 1997, the third circuit found that it was still not clear how Pennsylvania courts would interpret amendments to the PCRA. Specifically, in *Banks v. Horn*, the court noted that:

> While it is true that the text of the 1995 PCRA amendments supports these contentions [that the 1995 amendments bar a second collateral relief petition filed more than one year after a conviction], it is not clear that these amendments are dispositive. The Commonwealth does not refer us to a single case applying the PCRA as amended in 1995 to support its views. Furthermore, in [*Commonwealth v.*] *Szuchon*[, 534 Pa. 483, 633 A.2d 1098 (1993)] and [*Commonwealth v.*] *Beasley*[, 544 Pa. 554, 678 A.2d 773 (1996)] the Pennsylvania Supreme court addresses the merits of claims which seemingly were precluded by the PCRA provisions then in force.

126 F.3d at 214. *Banks* was a death penalty case, and the *Szuchon* and *Beasley* were both death penalty cases. Further, the *Banks* opinion notes that "the Pennsylvania ***589** Supreme Court does not apply Pennsylvania procedural bar rules consistently in death penalty cases." 126 F.3d at 213. However, the *Banks* opinion explicitly extends its reasoning beyond death penalty cases. The opinion states:

> It is, of course, possible in death penalty cases (and other cases as well) that future experience will show that the Pennsylvania Supreme Court consistently and regularly applies the 1995 amendments to the PCRA and thereby creates a procedural bar sufficient to satisfy the standard of *Johnson v. Mississippi*[, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988)]. That time, however, has not yet been reached.

126 F.3d at 214 n. 3. (citation omitted).

Trial courts in this district also noted that the ambiguity of the 1995 PCRA amendments extended to non-capital cases. *See Hammock v. Vaughan*, 1998 WL 163194, at *6 (E.D.Pa. April 7, 1998) ("The possibility exists, therefore, that...the statute of limitations bar will be waived by Pennsylvania courts in some cases. There is thus a lack of certainty with respect to state application of this procedural bar.."); *Peterson v. Brennan*, 1998 WL 470139, at *6 (E.D.Pa. August 11, 1998) (same).

Eventually, Pennsylvania state courts did interpret the 1995 PCRA amendments and held that the 1995 amendments were jurisdictional and would be adhered to strictly. *See Commonwealth v. Banks*, 556 Pa. 1, 726 A.2d 374, 375-76 (1999). Further, the 1995 PCRA amendments prohibited all second collateral relief petitions filed more than one year after a conviction became final, regardless of if the first petition was filed prior to the enactment of the 1995 PCRA amendments. *See id.* A recent federal district court case noted that the ambiguity related to the force of the 1995 PCRA amendments has only recently been remedied. *See Holman v. Gillis*, 58 F.Supp.2d 587, 594-96 (1999) ("In light of the mandate by the Pennsylvania Supreme Court...since December 1998, the court finds...that it can now be said with confidence that the Pennsylvania Supreme Court has consistently and regularly applied the 1995 amendments to the PCRA, namely, the one-year statute of limitations, as a procedural bar to all untimely PCRA petitions that do not qualify for any of the three exceptions.").

IV. Court Proceedings.

Indeed, the uncertainty about the force of the 1995 PCRA amendments extended to Pennsylvania state courts. On June 23, 1997, for example, the PCRA court did not dismiss Petitioner's PCRA petition as time barred. Rather, it denied the petition on its merits. Petitioner appealed.

Seven months after the dismissal of Petitioner's petition, the Superior Court of Pennsylvania issued the first state appellate court decision interpreting the recent amendments to the PCRA. *See Commonwealth v. Alcorn*, 703 A.2d 1054, 1056 (Pa.Super.Ct.1997) ("Our research indicated no prior decisions interpreting this section [42 Pa.C.S. § 9545]; therefore its applicability to this case presents a question of first impression."). The Superior Court in *Alcorn* held that the 1995 amendments to the PCRA disallowed second or successive petitions filed more than one year after the underlying conviction became final, even if the conviction became final, and the first petition was filed, before the enactment of the 1996 amendments. *Alcorn*, 703 A.2d at 1056-57.

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The Commonwealth then wrote a letter brief to the Superior Court concerning the pending appeal of Petitioner's PCRA petition. The brief argued that based on *Alcorn* the petition should be dismissed as time-barred. The Superior Court agreed ***590** and, on December 4, 1998, dismissed the petition as time-barred. Petitioner requested re-argument of the case, stating for the first time in a motion that prison officials had wrongfully withheld legal documents, and that that conduct entitled him to an exception to the PCRA's new statute of limitations pursuant to 42 Pa.C.S.A. § 9545(b)(1)(i). The Superior Court denied his request for re-argument without stating reasons. Petitioner appealed to the Supreme Court of Pennsylvania. Allocatur was declined by the Supreme Court on July 29, 1999.

On December 27, 1999, petitioner filed the instant federal *habeas* petition *pro se*. His petition included claims, among others, that 1) neither his state trial court judge nor his attorney properly informed him that his original life sentence expressly precluded the possibility of parole, and 2) that his sentence was given pursuant to a Pennsylvania statute which was inconsistent with other Pennsylvania statutes, in violation of Due Process Clause of the U.S. Constitution. The petition was referred to United States Magistrate Judge M. Faith Angell for a report and recommendation.

Judge Angell recommended that the petition be dismissed as time-barred because the Antiterrorism and Effective Death Penalty Act ("AEDPA") includes a statute of limitations that requires that habeas petitions be filed within one year of the date that a petitioner's conviction becomes final. *See* 28 U.S.C. § 2244(d)(1). Judge Angell accurately noted that petitioners whose convictions became final before the enactment of AEDPA's statute of limitations on April 24, 1996 have until one year from the enactment of the habeas statute of limitations to file their petitions. *See Burns v. Morton*, 134 F.3d 109, 111 (3d Cir.1998). Under this reasoning, Petitioner had only until April 23, 1997 to file his federal habeas petition; his petition had been filed two and a half years after this deadline. Section 2244(d)(2) of Title 28 states that a "properly filed" pending petition for state collateral relief tolls the statute of limitations for federal habeas purposes. Judge Angell reasoned that Petitioner's state collateral relief petition was not "properly filed," and, thus, did not toll AEDPA's statute of limitations.

The third circuit has determined that a "properly filed" state collateral relief petition is "one submitted according to the state's procedural requirements, such as the rules governing time and place of filing." *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir.1998). When Petitioner filed his state court petition, it was unclear as a matter of state law if his state petition would be time-barred. Once the Pennsylvania state courts delineated the new time limits of the PCRA, a Pennsylvania Superior Court dismissed Petitioner's PCRA petition as time-barred. Judge Angell concluded that a petition ultimately dismissed as time-barred by a Pennsylvania appeals court was not "submitted according to the state's procedural requirements" and thus, was not "properly filed" for the purpose of tolling the federal habeas statute. Since Petitioner had no "properly filed" state petition pending since the enactment of AEDPA, Judge Angell recommended that Petitioner's federal habeas petition should be dismissed because it was filed well after the statute of limitations period for filing a federal habeas petition.

Petitioner filed an objection to the Magistrate Judge's report and recommendation claiming that his state court petition should have tolled AEDPA's statute of limitation either because his state court petition was "properly filed" or because this court should apply "equitable tolling" pursuant to the third circuit's opinion in *Miller v. New Jersey Department of Corrections*, 145 F.3d 616 (3d Cir.1998). The ***591** United States responded to Petitioner's Objection. After review of the applicable case law, this court concludes that the petition was "properly filed" for purposes of tolling the federal habeas statute of limitations, and even if it was not properly filed, Petitioner was entitled to equitable tolling while his state court petition was pending.

Discussion

I. The PCRA Petition was Properly Filed and Tolled AEDPA's Statute of Limitations Because it Abided by all of Pennsylvania's Clear and Well Established Procedural Requirements.

[1][2][3] AEDPA's statute of limitation is tolled while a "properly filed" post-collateral relief petition is pending in state court. Last term, the United States Supreme Court defined a "properly filed" petition as follows:

> An application is "filed," as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record. *See, e.g., United States v. Lombardo*, 241 U.S. 73, 76, 36 S.Ct. 508, 60 L.Ed. 897 (1916) ("A paper is filed when it is delivered to the proper official and by him received and filed"); Black's Law Dictionary 642 (7th ed.1999) (defining "file" as "[t]o deliver a legal document to the court clerk or record custodian for placement into the official record"). And an application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. *See, e.g., Habteselassie v. Novak*, 209 F.3d 1208, 1210-1211 (10th Cir.2000); [*Bennett v. Artuz*,] 199 F.3d, [116] at 121 [(2nd Cir.1999)] (case below); *Villegas v. Johnson*, 184 F.3d 467, 469-470 (5th Cir.1999); *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir.1998).

Artuz v. Bennett, 531 U.S. 4, 121 S.Ct. 361, 363-64, 148 L.Ed.2d 213 (2000).

Previously, the third circuit had defined a "properly filed" PCRA petition as follows:

> We believe that "a properly filed application" is one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing. A Pennsylvania PCRA petitioner, for example, must file a motion with the clerk of the court in which he was convicted and sentenced, Pa. R.Crim. P. 1501, generally within one year of the date the judgment becomes final, 42 Pa. Cons.Stat. Ann. § 9545(b)(1). If a petitioner complies with these procedural requirements, or other procedural requirements the state imposes, his petition, even a second or successive petition, is "a properly filed application" for purposes of § 2244(d)(2). While we recognize that the Pennsylvania Supreme Court has announced strict rules regarding the granting of second and subsequent PCRA petitions, *see Commonwealth v. Lawson*, 519 Pa. 504, 549 A.2d 107 (1988), Pennsylvania allows for the filing of second or subsequent PCRA petitions, *see* 42 Pa. Cons.Stat. Ann. § 9545(b)(1), and courts occasionally grant relief in such proceedings, *see e.g., Commonwealth v. Morales*, 549 Pa. 400, 701 A.2d 516 (1997).

Lovasz v. Vaughn, 134 F.3d 146, 148-149 (3d Cir.1998). Thus, it is now fair to conclude that a PCRA petition is properly filed in Pennsylvania for purposes of tolling AEDPA's statute of limitations when it is delivered and accepted in accordance with applicable Pennsylvania laws and ***592** rules. Petitioner's PCRA petition was delivered and accepted in accordance with applicable Pennsylvania laws and rules. The PCRA court accepted Petitioner's application for filing and ruled on its merits. The fact that state law was subsequently established that resulted in the Superior Court of Pennsylvania dismissing the petition as time-barred does not alter this essential fact.

The United States Supreme Court has listed the types of requisite procedural requirements, among them timeliness, that warrant a state collateral relief petition being considered "properly filed." These include the forms used, the office to which the form is sent, and payment of the relevant filing fee. *See Artuz*, 121 S.Ct. at 364. Similarly, the third circuit has noted that, in addition to the timeliness of the petition, a PCRA petition must be filed with the same court in which the petitioner was sentenced in order to be properly filed. *See Lovasz*, 134 F.3d at 148. These examples show that the "properly filed" requirement is meant to disallow tolling only when state petitions fail to comply with clear and well established procedural requirements. *See Emerson v. Johnson*, 243 F.3d 931, 934 (5th Cir.2001) ("Although we might have read [the state statute] to prohibit Emerson's suggestion for reconsideration, given Texas case law, as well as the *Artuz* Court's broad reading of the phrase 'properly filed,' we must conclude Emerson 'properly filed' his suggestion for reconsideration."); *Hardy v. Secretary for the Dept. of Corrections*, 246 F.3d 1300, 1302 (11th Cir.2001) (suggesting "properly filed" under *Artuz* means "conform[ing] with Florida's basic procedural rules"). Therefore, Petitioner's PCRA petition was proper for federal habeas purposes given the state of the law at the time his petition was filed.

II. Third Circuit Precedent Supports Defining a Properly Filed Petition as One that Comports with Clear and Well Established State Procedural Requirements.

[4][5] The third circuit's interpretation of the term "properly filed" in 28 U.S.C. § 2244(d)(2) requires that state collateral relief petitions that have complied with all clear and established state law procedural requirements toll AEDPA's statute of limitations.

In *Lovasz*, the third circuit stated:

> We have yet to consider what constitutes "a properly filed application" to trigger the tolling mechanism of § 2244(d)(2). Principles of comity

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inform our decision. In our federal system, "the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731, 111 S.Ct. 2546, 2555, 115 L.Ed.2d 640 (1991). Such respect for the states has given rise to the well-established rule that a federal court should not find a state prisoner's claims procedurally barred from federal habeas review unless state law "clearly foreclose[s]" review of the claims. *Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir.1993); *see Banks v. Horn*, 126 F.3d 206, 211 (3d Cir.1997); *Doctor v. Walters*, 96 F.3d 675, 683 (3d Cir.1996). Moreover, in enacting AEDPA, of which § 2244(d) is a part, Congress intended to "reduce federal intrusion into state criminal proceedings." *Banks*, 126 F.3d at 213. Thus, if a state allows petitioners to file second or subsequent petitions for post-conviction relief, federal courts should not undermine the state's decision by refusing to toll the one-year period of limitation of § 2244(d)(1) where a second or subsequent petition is pending in the state court system. Nor should we discourage ***593** petitioners from exhausting all their claims in state court, even by means of a second or subsequent petition for post-conviction relief where permissible under state law, before seeking habeas review in federal court.

Lovasz, 134 F.3d at 148.

Federal courts must give state courts the first opportunity to correct their alleged errors. Tolling AEDPA's statute of limitations whenever petitioners have complied with all the state courts' clear and established procedural rules squares with the requirement of allowing a state the first opportunity to correct alleged violations of federal rights. A petitioner will be discouraged from filing in state court if it is believed that there is a possibility that the opportunity to bring a federal habeas petition will be lost should the state court end up finding that the state petition is procedurally barred. *See Swartz v. Meyers*, 204 F.3d 417, 419 (3d Cir.2000); *Emerson*, 243 F.3d at 935.

The third circuit has held that "in the absence of a state court decision indicating that a habeas corpus petitioner is clearly precluded from relief, the district court should dismiss the claim for failure to exhaust even if it is not likely that the state court will consider petitioner's claim on the merits." *Banks v. Horn*, 126 F.3d 206, 211 (3d Cir.1997). *See also Lines v. Larkins*, 208 F.3d 153, 163 (3d Cir.2000) (noting petitions should be dismissed for failure to exhaust even it is "unlikely that further state process is available"); *Lambert v. Blackwell*, 134 F.3d 506, 517-18 (3d Cir.1997). Thus, the third circuit requires that petitioners exhaust in state court whenever a petitioner is not clearly precluded from relief on state procedural grounds, even if it is very likely, though not certain, that the petition will be dismissed in state court on procedural grounds. It follows that when petitioners file petitions in state court that are not clearly foreclosed by state procedural law, the petitions must be considered properly filed and toll AEDPA's statute of limitations. The third circuit took this position when it determined AEDPA's statute of limitation would toll while the time to file a state appeal of the denial of a PCRA petition was running, even if the petitioner did not file such an appeal. Specifically, the court stated that its decision to toll AEDPA during the time allowed for an appeal of a state court decision

> finds support in the principle of state-remedy exhaustion. In *Mills v. Norris*, 187 F.3d 881 (8th Cir.1999), the Court of Appeals for the Eighth Circuit applied the principle of exhaustion to a somewhat similar factual scenario. Mills had filed a petition for post-conviction relief before the enactment of AEDPA. On August 15, 1996, the trial court denied his petition. Four days later Mills filed a notice of appeal with the Arkansas Supreme Court, but failed to file the record on appeal within the requisite ninety days as provided by Arkansas' procedural rules. The Arkansas Supreme Court took no action on the appeal. Then, on October 9, 1997, Mills filed a federal habeas petition. The issue before the Eighth Circuit was, in light of Mills' failure to perfect his appeal, on what date did his post-conviction relief motion cease "pending." See *id.* at 882, 884.
>
> Mills argued that the period was tolled until the end of the 90 days to perfect his appeal. The State argued that the appeal was not pending because Mills failed to timely file the record on appeal as required by the appellate rules. After reviewing the principles of exhaustion and comity, the court concluded:
>
> ***594** In this case, if Mills had filed his federal petition during the ninety days following the filing of his notice to appeal to the Supreme Court of Arkansas, the federal petition would surely have been dismissed for failure to exhaust state remedies, because there was still time to perfect his state appeal by filing the record with the Clerk of the Arkansas Supreme Court. That being so, we conclude the state postconviction appeal was "pending" for purposes of § 2244(d)(2) until at least November 17, 1996, the end of that ninety-day period. Thus, Mills timely filed his federal habeas petition on October 9, 1997.
>
> *Id.* at 884.
>
> We find these reasons convincing. If Swartz had attempted to seek federal habeas corpus relief while there was still time to seek allowance of appeal, the petition would automatically be dismissed for failure to exhaust state remedies.

Swartz, 204 F.3d at 422.

Similarly, the Petitioner is entitled to a tolling of AEDPA's statute of limitations since his state petition was filed at a time when a habeas petition, if filed in federal court, would have been dismissed. *See* Part IIIB, infra. Therefore, this court holds that Petitioner's state court petition tolled AEDPA's statute of limitations and that the federal habeas petition must now be considered on its merits.

III. The Statute of Limitations Equitably Tolled While the PCRA Petition was Pending.

A. Equitable Tolling Is Allowed in Extraordinary Circumstance.

[6] Petitioner is also entitled to equitable tolling to the extent that he did not file his federal habeas petition timely. The third circuit has allowed exceptions to AEDPA's one year statute of limitations where strict adherence to the statute of limitations would be unfair. In *Miller v. New Jersey Department of Corrections*, 145 F.3d 616 (1998), the court stated that

> For guidance of the district court, we observe that equitable tolling is proper only when the "principles of equity would make [the] rigid application [of a limitation period] unfair." Generally, this will occur when the petitioner has "in some extraordinary way...been prevented from asserting his or her rights." The petitioner must show that he or she "exercised reasonable diligence in investigating and bringing [the] claims." Mere excusable neglect is not sufficient.

145 F.3d at 618-619 (citations omitted) (brackets and ellipses in original). Here, Petitioner exercised reasonable diligence in bringing his claims and it would be unfair, and would rise to an extraordinary deprivation of rights, if under these circumstances he were barred by AEDPA's one year statute of limitations.

B. The Petitioner Would Not Have Been Able to File His Petition in Federal Court in 1996.

The Petitioner would not have been allowed to file a petition in federal court within one year of when AEDPA was enacted because the federal courts in this district would have refused to hear his federal claims because he had failed to exhaust his remedies in state court. As of September 1997, the third circuit stated that it was still not clear how Pennsylvania courts would interpret amendments to the PCRA and that federal courts should not hear petitions that were not brought in state court simply because they would be thought to be excluded by the 1995 amendments to the PCRA. *See Banks*, 126 F.3d at 211- 14. *See also Hammock v. Vaughan*, 1998 WL 163194, at ***6** (April 7, ***595** 1998) ("There is thus a lack of certainty with respect to state application of [the 1995 PCRA amendments.] This lack of certainty requires dismissal of the petition."); *Peterson*, 1998 WL 470139, at ***6** (August 11, 1998) (same). Only recently have the state courts interpreted the 1995 amendments to the PCRA conclusively enough that federal courts do not have to dismiss habeas petitions that seem to be barred by the text of the 1995 amendments. *See Lines v. Larkins*, 208 F.3d at 164 (3d Cir.2000) ("[I]t is now clear that the one year limitation applies to all PCRA petitions including a second petition, no matter when the first was filed."); *Holman v. Gillis*, 58 F.Supp.2d 587, 594-96 (E.D.Pa.1999).

C. AEDPA's Statute of Limitations Is Tolled Due To Pendency of Petitioner's 1996 PCRA Petition.

It would be patently unfair if the federal statute of limitations ran during the time in which Petitioner was not allowed to bring a federal petition. Accordingly, AEDPA's statute of limitations was equitably tolled while Petitioner's second PCRA petition was pending from November 27, 1996 to July 29, 1999.

Petitioner's sentence was life without the possibility of parole and was imposed when he was only seventeen years old. In applying equitable tolling in a capital case, the third circuit stated, "In a capital case such as this, the consequences of error are terminal, and we therefore pay particular attention to whether principles of 'equity would make rigid application of a limitation period unfair' and whether petitioner has 'exercised reasonable diligence in investigating and bringing [the] claims.' " *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir.2001) (citing *Miller*, 145 F.3d at 618).

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The *Fahy* court went on to state, "We elect to exercise leniency under the facts of this capital case where there is no evidence of abuse of process." *Fahy*, 240 F.3d at 245. Similarly, this case calls for leniency since the consequence facing Petitioner, the certainty of spending age seventeen until his life ends in prison, is extremely grave. [FN1] Should the court not toll AEDPA's statute of limitations, then Petitioner will have to spend life in prison without being allowed federal review of his claims. *See Fahy*, 240 F.3d at 245. Accordingly, this court finds that extraordinary circumstances exist in this case and that AEDPA's one-year statute of limitations was equitably tolled while Petitioner's PCRA petition was pending.

> FN1. The Supreme Court has recognized the special gravity of life without the possibility of parole, noting that the sentence "is far more severe" than a life sentence and that only "capital punishment...exceeds it." *Solem v. Helm*, 463 U.S. 277, 297, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

Conclusion

This court finds that Petitioner was entitled to statutory tolling and equitable tolling while his PCRA petition was pending. Because Petitioner's conviction became final before the enactment of AEDPA, he had one year from April 24, 1996, excluding the period in which the statute equitably tolled, to file his federal habeas petition. *See Burns*, 134 F.3d at 111.

The federal statute of limitations ran from April 24, 1996 (the date of the enactment of AEDPA) to November 26, 1996 (the day before petitioner filed his PCRA petition) and from July 30, 1999 (the day after the Pennsylvania Supreme Court declined to review the Pennsylvania Superior Court denial of his PCRA petition) until late December, 1999 when Petitioner filed his federal habeas petition. Given the one year statute of limitations, Petitioner had until December 24, 1999 to file his federal ***596** habeas petition. Petitioner dated his federal habeas petition December 22, 1999. The clerk of the court marked Petitioner's petition as filed on December 27, 1999. The prison mailbox rule states that the petition is deemed filed when a prisoner gives his petition to prison officials. *See Burns*, 134 F.3d at 113. Since the Commonwealth does not argue otherwise, this court assumes Petitioner gave his petition to prison officials by December 24, 1999 making his federal habeas petition timely filed.

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United States District Court, E.D. Pennsylvania.

John A. PACE, Petitioner,
v.
Donald VAUGHN, et al., Respondent.

No. CIV.A. 99-6568.

March 29, 2002.

MEMORANDUM

GILES, C.J.

I. Introduction

***1** John A. Pace ("Mr. Pace"), a state prisoner who pled guilty to second- degree murder and possession of an instrument of crime, petitions for a writ of *habeas corpus* under 28 U.S.C. § 2254. This court had referred Mr. Pace's petition to United States Magistrate Judge M. Faith Angell for a Report and Recommendation. She recommended that the petition be dismissed as time-barred because the Antiterrorism and Effective Death Penalty Act ("AEDPA") includes a statute of limitations that requires that federal *habeas* petitions be filed within one year of the date that a petitioner's conviction becomes final in state court. *See* 28 U.S.C. § 2244(d)(1). The Recommendation accurately noted that petitioners whose convictions became final before the enactment of AEDPA's statute of limitations on April 24, 1996, have one year from that date to file their petitions. *See Burns v. Morton*, 134 F.3d 109, 111 (3d Cir.1998). It concluded that a petition ultimately dismissed as time-barred by a Pennsylvania appeals court was not submitted according to the state's procedural requirements, and thus, was not "properly filed" for purposes of tolling the federal *habeas* statute. (Report and Recommendation at 7.) The Recommendation reasoned that petitioner had only until April 23, 1997 to file his federal *habeas* petition. This § 2254 petition was filed by December 24, 1999 and was, therefore, seen as time-barred.

Petitioner filed objections to the Report and Recommendation claiming that his second state court petition, pursuant to the Pennsylvania Collateral Relief Act ("PCRA"), should have tolled AEDPA's statute of limitations either because his state court petition was "properly filed" or because this court should apply "equitable tolling" pursuant to the third circuit's opinion in *Miller v. New Jersey Dep't of Corrs.*, 145 F.3d 616 (3d Cir.1998). The Commonwealth of Pennsylvania responded, opposing the objections. In *Pace v. Vaughn*, 151 F.Supp.2d 586, 591 (E.D.Pa.2001), this court held that Mr. Pace's state court petition was "properly filed" for purposes of tolling the federal *habeas* statute of limitations, and that, even if it had not been "properly filed," petitioner was entitled to equitable tolling while his second state court PCRA petition was pending.

On June 22, 2001, the respondents moved for reconsideration or permission to appeal. Oral argument was heard on January 29, 2002. For the following reasons, the motion for reconsideration is denied and the motion for permission to appeal is granted.

II. Background

A. State Court Proceedings

On February 13, 1986, petitioner pled guilty before the Honorable David N. Savitt of the Court of Common Pleas of Philadelphia County to the charges of possession of an instrument of crime and the second-degree murder of Randolph Baldwin. Petitioner, who was then seventeen years old, was sentenced to life imprisonment without the possibility of parole. Petitioner did not file a motion to withdraw the guilty plea and he did not file a direct appeal.

Six months later on August 21, 1986 petitioner filed a *pro se* petition under the Pennsylvania Post Conviction Hearing Act ("PCHA"), 42 PA. CONS.STAT.ANN. § 9541, *et seq.* Through appointed counsel, petitioner eventually filed an amended petition claiming both trial court error and ineffective assistance of trial counsel. The Commonwealth moved to dismiss the amended PCHA petition. The PCHA court granted that motion on July 23, 1991. On March 30, 1992, the Superior Court affirmed the PCHA court's decision. The Supreme Court of Pennsylvania denied Allocatur on September 2, 1992.

***2** The PCHA was replaced by the PCRA in 1988. The PCRA was amended in 1995 and those amendments became effective on January 16, 1996. Act of Nov. 17, 1995, P.L. 1118 No. 32 (Spec. Sess. No. 1), § 1.

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On November 27, 1996, petitioner filed a second *pro se* application for collateral relief under the PCRA. The PCRA court appointed counsel and allowed petitioner to amend his application. Mr. Pace's second application alleged that: (1) the imposition of a life sentence without eligibility for parole was illegal; (2) the guilty plea was entered involuntarily; and (3) all counsel were ineffective, resulting in a denial of due process. (§ 2254 Pet. at 5- 5A.) On July 23, 1997, the PCRA court denied the petition on its merits. Petitioner appealed to the Superior Court of Pennsylvania.

While petitioner's appeal was pending, the Superior Court decided *Commonwealth v. Alcorn*, 703 A.2d 1054, 1057 (Pa.Sup.Ct. Dec. 17, 1997). It held, for the first time, that the 1995 amendments to the PCRA disallowed second or successive petitions filed more than one year after an underlying conviction became final, even if the conviction became final and the first petition was filed before the enactment of the 1996 amendments. *Alcorn*, 703 A.2d at 1056 (finding that "our research has indicated no prior decisions ... interpreting this section [9545(b)]; therefore, its applicability to this case presents a question of first impression").

The Commonwealth wrote a letter brief to the Superior Court concerning the pending appeal of the denial of Mr. Pace's second PCRA petition. It argued that based on *Alcorn* the petition was time-barred. The Superior Court agreed and, on December 3, 1998, it dismissed the petition as time-barred.

By motion, petitioner requested re-argument, contending there for the first time that prison officials had wrongfully destroyed legal documents, and that that conduct entitled him to an exception to the PCRA's new statute of limitations, pursuant to 42 PA. CONS.STAT.ANN. § 9545(b)(1)(i) ("the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim ..."). (Pet.'s Objs. to Magis. Rep. and Recommendation, Ex B, App. for Re-argument at 3.) On February 8, 1999, without stating reasons, the Superior Court denied the request for re-argument. Petitioner appealed to the Supreme Court of Pennsylvania. Allocatur was denied on July 29, 1999.

B. Federal Proceedings

***3** On December 24, 1999, petitioner filed this federal *habeas* petition, *pro se*. In it, he claimed that 1) neither his state trial court judge nor his attorney properly informed him that his original life sentence expressly precluded the possibility of parole, and 2) his sentence was meted out pursuant to a Pennsylvania statute which was inconsistent with other Pennsylvania statutes, in violation of the Due Process Clause of the United States Constitution. (§ 2254 Pet. at 8.)

As discussed *supra*, Magistrate Judge Angell recommended that the § 2254 petition be dismissed as time-barred. This court declined to follow the Report and Recommendation and, in an opinion dated June 7, 2001, found that Mr. Pace's petition was "properly filed" for purposes of tolling the federal *habeas* statute of limitations and that, even if it had not been properly filed, petitioner was entitled to equitable tolling while his second PCRA petition was pending.

Respondents filed a motion for reconsideration on the grounds that this court's holding is directly contrary to *Fahy v. Horn*, 240 F.3d 239 (3d Cir.2000) , which, they argue, is binding authority as to both the statutory and equitable tolling issues raised by Mr. Pace. (Resps.' Pet. at 2.) Since the June 7, 2001 order and opinion in *Pace*, there have been relevant circuit case law developments on the issue of whether a state PCRA petition, ultimately declared untimely by the state's highest court, may be "properly filed" for purposes of the federal *habeas* statute. Also, the third circuit has rendered decisions which clarify that court's position on equitable tolling. Nevertheless, while this court denies the respondents' motion for reconsideration, it grants permission for an immediate appeal because there are important legal questions involved which perhaps should most appropriately be answered by the third circuit at this stage of the proceedings.

III. Discussion

A. Standard for a Motion for Reconsideration and for Interlocutory Appeal

1. Motion for Reconsideration

Reconsideration of a judicial ruling is appropriate if (1) there has been an intervening change in controlling law; (2) there is new evidence not previously available; or (3) there is a need to correct a clear error of law or fact or to prevent a manifest injustice. *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116-117 (3d Cir.1997).

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2. Interlocutory Appeal

The appropriate standard for an order granting permission for an interlocutory appeal is whether (1) the order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

B. Mr. Pace's Second PCRA Petition Statutorily Tolled AEDPA's Statute of Limitations

1. AEDPA's Statute of Limitations

***4** A state prisoner must file his or her federal *habeas corpus* petition within one year after the completion of the state court proceedings. 28 U.S.C. § 2244(d)(1). The following section became effective on April 24, 1996, when the Antiterrorism and Effective Death Penalty Act of 1996 was signed into law:

Title 28 U.S.C. § 2244(d) provides in relevant part:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of *habeas corpus* by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; ...

(2) The time during which a properly filed application for State post- conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection. 28 U.S.C. § 2244(d).

AEDPA's statute of limitations is subject to statutory and equitable tolling. *Miller*, 145 F.3d at 618. In addition, the third circuit has held that it would be impermissibly retroactive to "bar the filing of a *habeas* petition before April 23, 1997, where the prisoner's conviction became final before April 24, 1996 ..." *Burns*, 134 F.3d at 111. Mr. Pace's conviction became final in 1986. He had one year from the enactment of AEDPA, plus any additional time, for which he can show statutory or equitable tolling is appropriate, within which to file a federal *habeas* petition.

2. Pennsylvania's PCRA Statute

When petitioner filed his second PCRA petition on November 27, 1996, the Pennsylvania collateral relief statute had recently been amended. The amendments placed new time limits on PCRA petitions. The relevant part of the amended limitation subsection reads:

(b) Time for filing petition.--

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively. 42 PA. CONS.STAT.ANN. § 9545.

The 1995 PCRA amendments were accompanied by a Note concerning legislative intent. The Note stated that "a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition under [42 PA. CONS.STAT.ANN. § 9545(b)] if the petitioner's first petition is filed within one year of the effective date of the act." Sec. 3(1) of Act 1995 (Spec. Sess. No. 1), Nov. 17, P.L. 1118, No. 32. On its face, § 9545(b) of the PCRA states that a petition must be filed within one year of the date that a petitioner's conviction becomes final, unless the petition falls within one of its enumerated exceptions, or the petitioner's conviction became final before the effective date of the amendments and the petitioner is filing a first application.

3. Pace's Second PCRA Petition was "Properly Filed" Under Federal Law

***5** The Supreme Court held in *Artuz v. Bennett*, that a state *habeas* petition is "properly filed" for purposes of § 2244(d)(2) and statutorily tolls the federal *habeas* statute

when its delivery and acceptance are in

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compliance with the applicable laws and rules governing filing. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. 531 U.S. 4, 8, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000) (quoting *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir.1998)).

"[T]he question whether an application has been 'properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." *Artuz*, 531 U.S. at 9. *Artuz* distinguishes between state statutes or statutory provisions which set forth "a condition to filing" as opposed to "a condition to obtaining relief." *Id.* at 11.

However, *Artuz* specifically left open the question "whether the existence of certain exceptions to a 'timely' filing requirement in a state collateral relief statute can prevent a late application from being considered 'improperly' filed" for federal *habeas* purposes. *Id.* at 9 n. 2. Although the third circuit has not directly answered this question, other circuits which have decided the issue have found that "if a state's rule governing the timely commencement of state post conviction relief petitions contains exceptions that require a state court to examine the merits of a petition before it is dismissed, the petition, even if untimely, should be regarded as 'properly filed.' " Such a statute "does not impose an absolute bar to filing" and is a "condition to obtaining relief" rather than a "condition to filing." *Dictado v. Ducharme*, 244 F.3d 724, 728-29 (9th Cir.2001); *Smith v. Ward*, 209 F.3d 383, 384-85 (5th Cir.2000) (holding that a petition is "properly filed," even if eventually dismissed as untimely, when the state statute governing timely filings contains certain exceptions which require some level of judicial review); *but see Brooks v. Walls*, No. CIV.A. 01-1584, 279 F.3d 518, 2002 WL 126606, at *2 (7th Cir. Feb. 2, 2002) (holding that a "plain error exception" to a state statute's timely filing requirement does not prevent a late application from being "improperly" filed for federal *habeas* purposes). [FN1]

FN1. Pennsylvania's PCRA statute differs materially from the Illinois PCRA statute which the seventh circuit treats as a procedural filing requirement even though Illinois state court judges "cast at least a sidelong glance at the merits in order to determine whether to excuse failure to meet the deadline." *Brooks*, 279 F.3d 518, 2002 WL 126606, at *1. The Illinois PCRA statute states in relevant part:

(c) No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed or more than 45 days after the defendant files his or her brief in the appeal of the sentence before the Illinois Supreme Court (or more than 45 days after the deadline for the filing of the defendant's brief with the Illinois Supreme Court if no brief is filed) or 3 years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. 725 IL.COMP.STAT. 5/122-1(c).

The seventh circuit found that the Illinois statute "lacks the merits- related exceptions that the [AEDPA] applies to federal courts." *Brooks*, 279 F.3d 518, 2002 WL 126606, at *3. Instead, an Illinois state court may excuse a late filing if the petition demonstrates "plain error." *Id.* Conversely, the "merits-related" exceptions to the timeliness requirement in Pennsylvania's PCRA statute are virtually identical to those contained in the AEDPA. *Compare* 42 PA. CONS.STAT.ANN. § 9545(b)(1)(i)--(iii) *with* 28 U.S.C. 2244(d)(1)(B)--(D).

The seventh circuit described the approach of Illinois trial judges in evaluating untimely PCRA petitions as follows: "Thus any state prisoner whose delay was not caused by his own 'culpable negligence' (which forecloses any consideration of an untimely filing) receives either plenary review or a judicial response along the lines of 'this petition is late; and because it does not demonstrate a miscarriage of justice, I have decided not to excuse the untimeliness.' " *Brooks*, 279 F.3d 518, 2002 WL, 126606, at *1.

Although the seventh circuit has characterized its review as "non-merits based," it is respectfully suggested that as the "sidelong glance at the merits" is meant to be meaningful and not a frivolous judicial exercise, it is a "merits-based" review system. The merits are considered, however cursorily, with a deliberate eye trained to determine if the untimeliness of the petition should be excused to avoid a miscarriage of justice in a particular case.

Current third circuit precedent is entirely consistent with the approach that the ninth and fifth circuits have employed. In *Nara v. Franks*, the third circuit discussed the flexible approach that it has adopted in determining whether a state collateral petition is "properly filed" for purposes of § 2244(d)(2) and statutorily tolls AEDPA. *See Nara v. Frank*, 264 F.3d 310, 315 (3d Cir.2001). In determining that petitioner Nara's state post-conviction petition was properly filed for purposes of federal law, it applied the distinction discussed in *Artuz* between whether a state collateral petition meets the "conditions for filing" as contrasted to an inquiry as to whether the claims in the petition meet all of the "conditions for obtaining relief" under state law. *Id.* [FN2]

FN2. Petitioner Nara had filed a motion to withdraw a guilty plea *nunc pro tunc* which the third circuit noted is akin to an application for state post-conviction or other collateral review. *Id.* at 316.

Nara is consistent with its earlier decision in *Lovasz* which held that the question of whether a state court petition is "properly filed" does not depend upon the state court's ultimate ruling on the merits of the application. *Nara*, 264 F.3d at 315 (quoting *Lovasz*, 134 F.3d at 149 (a meritless PCRA petition can still constitute a "properly filed application" under § 2244(d))). *Lovasz* found that if a state allows petitioners to file second or successive petitions for post-conviction relief, federal courts should not undermine the state's decision by refusing to toll the one year period of limitation of § 2244(d)(1) while a second or successive petition is pending in the state court system. *Lovasz* stated that "[w]hile we recognize that the Pennsylvania Supreme Court has announced strict rules regarding the granting of second and subsequent petitions, Pennsylvania allows for the filing of second or subsequent PCRA petitions, and courts occasionally grant relief in such proceedings. (citations omitted)" *Lovasz*, 134 F.3d at 148-149.

*6 As discussed above, § 9545(b)(1) of the PCRA statute sets forth strict rules or conditions for obtaining relief under Pennsylvania law. However, this statute is not an absolute bar to filing a second or successive petition more than one year after a conviction became final. The statute contains exceptions that require "some level of judicial review" to examine the merits of the petition before it can be dismissed as time-barred. At the very least, a state court must examine a PCRA petition to determine whether the petition alleges any of the enumerated exceptions to the one year time-limit: (i) that the failure to raise the claim previously was the result of interference by a government official; (ii) that the facts upon which the claim is predicated were unknown to the petitioner; or (iii) that the right asserted is a newly recognized and retroactive constitutional right. 42 PA. CONS.S TAT.ANN. § 9545(b)(1).

Therefore, this court sees § 9545(b)(1) of the PCRA statute, as imposing conditions for obtaining relief and not as an absolute bar to filing a petition. *See Rosado v. Vaughn*, No. CIV.A. 00-5808, 2001 WL 1667575, at * 3 (E.D.Pa. Dec. 28, 2001) (finding that § 9545(b) "discourages late PCRA petitions by strictly limiting the availability of relief, but, given its exceptions, it does not impose an absolute bar to filing a late application: it is not a procedural filing requirement."); *Cooper v. Vaughn*, No. CIV.A. 00-6016, 2001 WL 1382492, at *3 (E.D.Pa. Nov. 6, 2001) (same). Mr. Pace's second PCRA petition was untimely under Pennsylvania law in that it was too late for him to obtain relief under Pennsylvania law, yet, the PCRA petition was "properly filed" for purposes of federal law and tolled AEDPA's statute of limitations since it complied with the relevant factors set forth in *Lovasz*. 134 F.3d at 148.

4. Fahy Does Not Preclude a Finding That Pace's Second PCRA Petition Was Properly Filed

*7 Respondents argue that *Fahy* controls the issue and requires a finding that Mr. Pace's second PCRA petition was not "properly filed." (Resp.'s Mot. at 2.) However, in a decision after *Fahy*, the third circuit specifically declined to reach the issue of whether a second PCRA petition, clearly untimely under Pennsylvania law, was necessarily not "properly filed" under § 2244(d)(2) for federal purposes. *See Banks v. Horn*, 271 F.3d 527, 534 (3d Cir.2001) [*Banks IV*] [FN3]. The third circuit stated:

FN3. There are numerous relevant and important opinions in the various *Banks* proceedings. While we designate the opinions for purposes of this opinion, they are not consistent with how other courts have numbered the various decisions. *Banks v. Horn*, 126 F.3d 206 (3d Cir.1997) [*Banks I*]; *Banks v. Horn*, 63 F.Supp.2d 525 (M.D.Pa.1999) [*Banks II*]; *Commonwealth v. Banks*, 556 Pa. 1, 726 A.2d 374 (Pa.1999) [*Banks III*]; *Banks v. Horn*, 271 F.3d 527 (3d Cir.2001) [*Banks IV*].

[w]hile we could explore this concept [whether an untimely state petition is necessarily not properly filed] under the applicable Pennsylvania law and under the federal *habeas* case law, *Artuz*, we need

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not do so, because we conclude that, even were we to decide that the late filing of Banks's second PCRA rendered it not 'properly filed,' the District Court appropriately called on equitable principles to toll the one-year AEDPA requirement given this unusual fact pattern. (citations omitted) *Id.*

Fahy does not control an issue which the third circuit recognized had not been decided as of October 31, 2001, the date of the *Banks IV* decision.

Respondents further contend that *Fahy* stands for the proposition that an untimely PCRA petition cannot be "properly filed" under federal law. (Resps.' Mot. at 10.) Actually what *Fahy* holds is that a federal court, in determining whether a state PCRA petition was "properly filed," must interpret state law as it does when sitting in a diversity case and must defer to a state's highest court when it rules on an issue. 240 F.3d at 243-244. The *Fahy* panel observed that the Pennsylvania Supreme Court had specifically ruled that Fahy's petition *was not properly filed as a matter of state law* and that that determination by the highest state court was binding on a federal court. *Id.*

For factual and legal reasons, *Fahy* does not apply to the matter at hand. Factually, this case is materially different from *Fahy*. Here, there has not been a similar determination by Pennsylvania's highest court that Mr. Pace's second PCRA petition was improperly filed as a matter of state law. Here, the PCRA court did not dismiss Mr. Pace's second PCRA petition as time-barred when it was filed on November 27, 1996. Here, the PCRA court appointed counsel to represent Mr. Pace, gave appointed counsel an opportunity to amend the petition, and on July 23, 1997, denied the petition *on its merits*. Petitioner timely appealed to the Superior Court. While the appeal was pending, the Commonwealth sent a letter brief to the Superior Court arguing that Mr. Pace's petition should be dismissed as time-barred, based on *Alcorn*. In seeking reconsideration of the court's rejection of his petition as time-barred, petitioner made a new factual claim that squarely came within one of the exceptions to the PCRA's new statute of limitations. The Superior Court denied petitioner's request for re-argument *without stating reasons*.

The court acknowledges the argument that Mr. Pace waived his right to raise the governmental interference exception to the PCRA statute of limitations raised to the superior court because he did not make that allegation initially when he filed his second PCRA petition. 42 PA. CONS.STAT.ANN. § 9544(b) (Resp. to Petitioner's Objs. to R & R at 5.). However, given that the Pennsylvania Supreme Court had previously allowed merits review of technically defaulted claims, *see Commonwealth v. Lawson*, 519 Pa. 504, 549 A.2d 107, 111-112 (Pa.1988), Mr. Pace had a good faith basis in believing that that court would review this technically waived issue, which had fundamental constitutional dimensions.

***8** It is noticed that while *Fahy* was filed (Feb. 9, 2001) after the Supreme Court's decision in *Artuz*, (Nov. 7, 2000), the third circuit did not cite to that decision or attempt to reconcile it to the facts and circumstances of *Fahy*. Notably, subsequently, *Nara*, the most recent third circuit opinion on the issue of statutory tolling (Aug. 30, 2001), did cite and follow *Artuz*. Therefore, as a matter of precedent, *Nara*, not *Fahy*, controls disposition of this case.

Further, the *Fahy* panel relied on a ninth circuit case, *Dictado v. Ducharme*, 189 F.3d 889 (9th Cir.1999) [*Dictado I*] which was subsequently reversed by *Dictado v. Ducharme*, 244 F.3d 724 (9th Cir.2001) [*Dictado II*]. The ninth circuit reversed to make *Dictado I* consistent with *Artuz*. The third circuit had cited the *Dictado I* opinion for its language: "Had Congress intended to toll the statute of limitations for the period during which even improper applications were pending in state court, it would not have included the 'properly filed' limitation." *Fahy*, 240 F.3d at 243 (quoting *Dictado I*, 189 F.3d 889, 892 (9th Cir.1999)). This is the very language that the ninth circuit decided to disavow in light of *Artuz*. *Dictado I* was withdrawn after *Artuz* distinguished between state statutes which are "conditions to filing" as opposed to state statutes which are "conditions to obtaining relief," and left open the question whether the existence of certain exceptions to a timely filing requirement can prevent a late state post collateral petition from being considered "improperly filed." *Dictado II*, 244 F.3d 724, 727 (2001) (quoting *Artuz*, 531 U.S. at 9 n. 2). That is precisely the question now at issue in this case.

In *Dictado II*, the ninth circuit held that "if a state's rule governing the timely commencement of state post conviction relief petitions contains exceptions that require a state court to examine the merits of a petition before it is dismissed, the petition, even if untimely, should be regarded as "properly filed." *Id.* at 727-28. Had the third circuit panel relied on *Dictado II*, an opinion consistent with *Artuz*, the panel might have reached a conclusion consistent with *Dictado II*.

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C. Pace's Second PCRA Petition Equitably Tolled AEDPA's Statute of Limitations

1. Standard For Equitable Tolling

***9** The one year "period of limitation" under 28 U.S.C. § 2244(d)(1) to file a federal *habeas corpus* petition is a statute of limitations subject to equitable tolling. *See Miller*, 145 F.3d at 618. The *Miller* opinion explained that the one year federal *habeas* statute of limitations can be equitably tolled

> only when the principle of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not sufficient." *Id.* at 618.

The *Fahy* panel enumerated three circumstances which permit equitable tolling: "(1) if the defendant has actively misled the plaintiff; (2) if the plaintiff has in some extraordinary way been prevented from asserting his rights; or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum." *Fahy*, 240 F.3d at 244 (quoting *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir.1999)).

2. Mr. Pace Has Been Prevented From Asserting His Federal Rights in an Extraordinary Way

The recent third circuit decision, *Banks IV*, is instructive for determining whether Mr. Pace has in some extraordinary way been prevented from asserting his rights. *See Banks IV*, 271 F.3d at 534. There, the court approved the district court's reasons for equitably tolling the federal statute of limitations: (1) "the state of Pennsylvania law regarding the nature of the filing requirement [42 PA. CONS.STAT.ANN. § 9545(b)] was unclear, and Banks could reasonably have viewed the state limit as a mere statute of limitations subject to equitable tolling, not, as the Pennsylvania Supreme Court, later held ..., a jurisdictional requirement" and (2) viewing the Pennsylvania Supreme Court ruling as a bar to filing a federal *habeas* petition "would result in unfair forfeiture [of petitioner's federal rights] without notice." *Id.* at 534. The court found that these factors provide "a basis for us to call on equitable principles in application of our own federal time parameters-the one year AEDPA requirement." *Id.* These fairness factors are replicated here.

a. The Uncertain Nature of the PCRA Filing Requirement

***10** *i. Statutory Language and Legislative Note*

When Mr. Pace filed his PCRA petition in November 1996, it was not known how Pennsylvania courts would interpret the amendments to the PCRA statute that had become effective on January 16, 1996 and had placed a new one year time-limit on PCRA petitions. From the language of the statute itself, it is not clear that the time-limit is jurisdictional.

The *Banks II* district court decision held that while § 9545 is captioned "[j]urisdiction and proceedings," it is not clear from the statute that all of the subsections involve jurisdiction [FN4] or that subsection (b), stating the one year time-limit and the exceptions to it, was intended to be jurisdictional in nature. *See Banks v. Horn*, 63 F.Supp.2d 525, 532-33 (M.D.Pa.1999) [*Banks II*]. The limitations subsection (b) states that a petition "shall be filed within one year of the date the judgment becomes final ..." with certain exceptions. The subsection does not use "standard jurisdictional language" that "no court will have the authority to entertain an untimely petition." *Id.* at 534. The district court in *Banks II* concluded that "it cannot be said that § 9545(b) is necessarily jurisdictional in nature, as opposed to a statute of limitations subject to equitable tolling." *Id.* This court, like the third circuit in *Banks IV*, 271 F.3d at 534, finds the reasoning of the district court in *Banks II* persuasive and determinative.

> FN4. Subsection (a) states that original jurisdiction is in the Court of Common Pleas. Section (c) limits the jurisdiction of the state courts to issue a stay of execution. Section (d) states standards governing admissibility of evidence, discovery, and privilege during and relating to an evidentiary hearing. 42 PA. CONS.STAT.ANN. § 9545. Discovery and privilege are normally not considered jurisdictional matters. *Banks II*, 63 F.Supp.2d at 533.

Since Mr. Pace's conviction occurred prior to the enactment of the PCRA amendments, it also could not have been clear how, if at all, the amendments would apply to his second PCRA petition which was filed in November, 1996. The 1995 PCRA amendments had been accompanied by a Note regarding legislative intent. The Note stated that "a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to

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have filed a timely petition under [42 PA. CONS.STAT.ANN. § 9545(b)] if the petitioner's first petition is filed within one year of the effective date of the act." Section 3(1) of Act 1995 (Spec. Sess. No. 1), Nov., 17, P.L. 1118, No. 32. The Note did not clarify whether petitioners with pre-1996 final convictions, who filed second or successive petitions, but who were filing their *first* petition since the amendments, had one year after its enactment within which to file a collateral relief petition.

ii. Relaxed Waiver Practice of Pennsylvania State Courts

Although Mr. Pace's case is not a death penalty case, the general practice of Pennsylvania's state courts to provide merits review to technically defaulted claims in death penalty cases ("the relaxed waiver doctrine") increased the uncertainty of the PCRA one year time-limit during the period when Mr. Pace had to decide whether to file for collateral relief in state or federal court. State courts allowed merits review for claims barred by the statutory time- limit of the amended PCRA for capital, *and in some instances non-capital cases*, if the claims alleged (1) the failure to raise the claim earlier was caused by ineffective assistance of counsel, or (2) the failure to address the merits of the claim could result in a miscarriage of justice. *See Commonwealth v. Albrecht*, 554 Pa. 31, 720 A.2d 693, 700 (Pa.1998) (a PCRA petitioner's waiver will only be excused upon a demonstration of ineffectiveness of counsel in waiving the issue and only in a capital case); *but see Commonwealth v. Beasley*, 544 Pa. 554, 678 A.2d 773, 777 (Pa.1996) (stating that generally a second or successive post-conviction request for relief will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred but this showing is not required in a capital case). *Beasley* was decided on June 18, 1996, five months after the PCRA time-bar went into effect.

The third circuit itself has determined that it was not clear until *Commonwealth v. Banks*, 556 Pa. 1, 726 A.2d 374, 375-76 (Pa. Mar. 2, 1999) [*Banks III*] that the state PCRA statute of limitations was jurisdictional and not waivable, and that Pennsylvania state courts would discontinue the long-held practice of allowing merits review for claims barred by the PCRA time-bar. *See Fahy*, 240 F.3d at 245. Further, the third circuit has found that the uncertainty in the application of the relaxed waiver rule extended beyond capital cases. The third circuit stated that as of January 16, 1998, it was not clear that Pennsylvania's courts would bar merits review of a PCRA petition in a non-capital case even if that petition were untimely under the PCRA's statutory time-bar and did not meet any of the enumerated exceptions. *See Lambert v. Blackwell*, 134 F.3d 506, 521 & n. 26 (3d Cir.1998) ("... Pennsylvania courts have expressed a willingness to depart from the PCRA's stringent waiver standards, for non-capital, as well as capital cases ..."). In 1997 the third circuit stated that "it is, of course, possible in death penalty cases (and other cases as well) that future experience will show that the Pennsylvania Supreme Court consistently and regularly applies the 1995 amendments to the PCRA and thereby creates a procedural bar sufficient to satisfy the standard of *Johnson v. Mississippi*. That time, however, has not yet been reached." *Banks v. Horn*, 126 F.3d 206, 214 n. 3 (3d Cir.1997) [*Banks I*].

b. Treating Mr. Pace's Second PCRA Petition As Untimely And a Bar to Filing a Federal Habeas Petition Would Result in Unfair Forfeiture Without Notice

***11** It was not until the Pennsylvania Supreme Court decided *Banks III* in 1999 that it was sufficiently clear for federal review purposes that § 9545(b)(1) was jurisdictional and could operate as a bar to federal *habeas* review. *Fahy*, 240 F.3d at 245; *Banks IV*, 271 F.3d at 534. In *Banks IV*, the court noted that viewing the Pennsylvania Supreme Court's 1999 decision as a jurisdictional bar to a petitioner filing a pre-1999 federal *habeas* petition "would result in unfair forfeiture without notice." *Banks IV*, 271 F.3d at 534. Similarly, barring Mr. Pace from filing his pre-1999 federal *habeas* petition would result in forfeiture of his federal rights without notice. Mr. Pace could not, for federal *habeas* purposes, be said to have had knowledge that the PCRA time-limit was jurisdictional on April 23, 1997, the date that he would have had to file in federal court to protect his federal rights.

Pace's second PCRA petition, filed on November 27, 1996, alleged that: (1) the imposition of a life sentence without eligibility for parole was illegal; (2) his guilty plea was entered involuntarily; and (3) that all counsel were ineffective, resulting in a denial of due process. (§ 2254 Pet. at 8.) Mr. Pace's second PCRA petition alleged claims that traditionally had overcome the PCRA statutory time-bar. On July 23, 1997, the PCRA court denied Mr. Pace's petition on the merits, giving him no notice that his petition was jurisdictionally time-barred. Although the Superior Court dismissed the second PCRA petition as time-barred, Mr. Pace still had no absolute notice that that ruling meant the time-limit was jurisdictional and not waivable due to the nature of the claims that he raised to that court. When on March 2, 1999 Pennsylvania made it clear that the PCRA time-limit was jurisdictional, Mr. Pace had a motion pending before the Pennsylvania Supreme Court requesting Allocatur from the denial for the motion for re-argument by the Superior Court, discussed *supra*. That motion for re-argument had invoked one of the statutory exceptions to the PCRA time-bar, that is, "the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim ..." 42 PA. CONS.STAT.ANN. § 9545(b)(i). Mr. Pace, therefore, had no timely notice, while his second PCRA petition was in the state court system, that his failure to file a *habeas* petition in federal court would deny him his right to federal review.

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3. Mr. Pace Exercised Reasonable Diligence in Bringing His Claims

a. Pace Would Not Have Been Allowed to File His Petition in Federal Court At The Time Respondents Contend He Would Have Had To In Order To Protect His Federal Rights

***12** Mr. Pace would not have been allowed to proceed on a petition in federal court within the one year AEDPA statute of limitations because the federal courts in this district would have refused to hear his federal claims because he had failed to exhaust his remedies in state court. Mr. Pace filed his second PCRA petition in November 1996. As of September 1997, the third circuit stated that it was still not clear how Pennsylvania courts would interpret amendments to the PCRA and that federal courts should not hear petitions that were not brought in state court simply because they were thought to be excluded by the 1995 amendments to the PCRA. *See Banks I*, 126 F.3d at 211-14; *see also Hammock v. Vaughn*, No. CIV.A. 96-3463, 1998 WL 163194, at * 6 (E.D.Pa. April 7, 1998) ("There is thus a lack of certainty with respect to state application of [the 1995 PCRA amendments]. This lack of certainty requires dismissal /of the petition."); *Peterson v. Brennan*, No. CIV.A. 97-2477, 1998 WL 470139, at *6 (E.D.Pa. Aug. 11, 1998) (same). Only recently have the state courts interpreted the 1995 amendments to the PCRA conclusively enough that federal courts do not have to dismiss federal *habeas* petitions for failure to exhaust state remedies. *See Lines v. Larkins*, 208 F.3d 153, 164 (3d Cir.2000) ("It is now clear that the one year limitation applies to all PCRA petitions including a second petition, no matter when the first was filed."); *Holman v. Gillis*, 58 F.Supp. 587, 594-96 (July 21, 1999) (finding that the ambiguity relating to whether the one year statute of limitations is a procedural bar to all untimely PCRA petitions that do not qualify for the enumerated exceptions was only remedied in December 1998).

The third circuit stated in *Fahy*:

> When the state law is unclear regarding the operation of a procedural filing requirement, the petitioner filed in state court because of his or her reasonable belief that a § 2254 petition would be dismissed as unexhausted, and the state petition is ultimately denied on these grounds, then it would be unfair not to toll the statute of limitations during the pendency of the state petition up to the highest reviewing court." 240 F.3d at 245.

It was objectively reasonable for Mr. Pace to believe that if he filed a § 2254 petition at the time he filed his second PCRA petition, the federal petition would have been dismissed without prejudice as unexhausted. There has been no abuse of process by Mr. Pace and he has diligently and reasonably asserted his claims. *See Fahy*, 240 F.3d at 244.

This court equitably tolls AEDPA's statute of limitations while petitioner's second PCRA petition was pending from November 27, 1996 until July 29, 1999, because Mr. Pace meets the relevant factors discussed in *Miller*, *Jones*, *Fahy*, and *Banks IV*. In an "extraordinary way," the confluence of the following factors caused the petitioner to be prevented from asserting his federal rights: (1) the uncertainty of Pennsylvania law at the time that Mr. Pace had to choose whether to file a state or federal *habeas* petition; (2) lack of notice of forfeiture to Mr. Pace of his right to federal review of his conviction and sentence; (3) the fact that Mr. Pace would not have been allowed to proceed in federal court at the time he would have been required to file his federal *habeas* petition in order to preserve his federal rights; (4) Mr. Pace has diligently and reasonably asserted his claims; and (5) Mr. Pace's sentence is life without the possibility of parole.

4. Fahy Does Not Preclude a Finding that Petitioner's Second PCRA Petition Equitably Tolled the AEDPA Statute of Limitations

***13** *Fahy* held that equitable tolling was appropriate in a capital case even where extraordinary circumstances were not established. 240 F.3d at 245. Respondents argue that *Fahy* stands for the

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proposition that uncertainty in Pennsylvania law cannot constitute extraordinary circumstances. (Resps.' Mot. at 18.) Extraordinary circumstances exist in this case, not based solely on the uncertainty of Pennsylvania law, but also on the unusual confluence of factors that left Mr. Pace, who is serving life in prison without the possibility of parole, without notice of the forfeiture of his federal rights.

Petitioner's sentence, life without the possibility of parole, was imposed when he was only seventeen years old. In applying equitable tolling in a capital case, the third circuit stated, "[i]n a capital case such as this, the consequences of error are terminal, and we therefore pay particular attention to whether principles of 'equity would make rigid application of a limitation period unfair.' " *Fahy v. Horn*, 240 F.3d at 245 (citing *Miller*, 145 F.3d at 618). The *Fahy* court went on to state, "[w]e elect to exercise leniency under the facts of this capital case where there is no evidence of abuse of process." *Fahy*, 240 F.3d at 245. Mr. Pace's case calls for leniency too because the consequences facing him, the certainty of spending the rest of his life in prison, are extremely grave. [FN5] Should the court not toll AEDPA's statute of limitations, petitioner will have to spend the rest of his life in prison without being allowed federal review to correct what could be serious deprivations of federally protected constitutional rights. Accordingly, this court finds AEDPA's one year statute of limitations was equitably tolled while petitioner's second PCRA petition was pending.

FN5. The Supreme Court has recognized the special gravity of life without the possibility of parole, noting that the sentence "is far more severe" than a life sentence and that only "capital punishment ... exceeds it." *Solem v. Helm*, 463 U.S. 277, 297, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

IV. Conclusion

***14** This court finds that petitioner was entitled to statutory tolling and equitable tolling while his second PCRA petition was pending. Because petitioner's conviction became final before the enactment of AEDPA, he had one year from April 24, 1996, plus the period in which the statute statutorily or equitably tolled, to file his federal *habeas* petition. *See Burns*, 134 F.3d at 111.

The federal statute of limitations ran from April 24, 1996 to November 26, 1996 (the day before petitioner filed his second PCRA petition) and from July 30, 1999 (the day after the Pennsylvania Supreme Court declined to review the Pennsylvania Superior Court denial of his PCRA petition) until late December, 1999 when petitioner filed his federal *habeas* petition. Given the one year statute of limitations, petitioner had until December 24, 1999 to file his federal *habeas* petition. Petitioner dated his federal *habeas* petition December 22, 1999. The Clerk of Court marked petitioner's *habeas* petition as filed on December 27, 1999. The prison mailbox rule states that the petition is deemed filed when a prisoner gives his petition to prison officials. *See Burns*, 134 F.3d at 113. Since the Commonwealth does not argue otherwise, this court assumes petitioner gave his petition to prison officials by December 24, 1999 making his federal *habeas* petition timely filed.

For the reasons discussed above, the motion for reconsideration is denied. This opinion reaches the same conclusions on statutory and equitable tolling as previously stated in the June 7, 2001 opinion. However, it supercedes the previous opinion to reflect the Supreme Court's decision in *Artuz* and other relevant cases subsequently decided.

The respondents' motion for permission for immediate appeal is granted on the following issues since they involve controlling questions of law as to which there are substantial grounds for difference of opinion and an immediate appeal from this opinion and order may materially advance the earliest efficient resolution of the litigation. The questions of law are

1. Do the enumerated exceptions to Pennsylvania's PCRA statute of limitations, 42 PA. CONS.STAT.ANN. § 9545(b)(1), prevent a late state post collateral petition from being necessarily "improperly filed" for purposes of 28 U.S.C. § 2244(d)(2)?
2. Does the confluence of the following factors constitute "extraordinary circumstances" for purposes of equitably tolling AEDPA's one year statute of limitations: (1) the uncertainty of Pennsylvania law at the time that petitioner had to choose whether to file a state or federal *habeas* petition; (2) the lack of notice of forfeiture to petitioner of his right to federal review of his conviction and sentence; (3) the fact that petitioner would not have been allowed to proceed in federal court at the time he would have been required to file his federal *habeas* petition in order to preserve his federal rights; (4) and petitioner's sentence is life without the possibility of parole?

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The court stays review of the substantive merits pending outcome of the appeal.

***15** An appropriate order follows.

ORDER

AND NOW, this ___ day of March 2002, upon consideration of Respondents' Motion for Reconsideration, or in the Alternative for Permission to Appeal, Docket # 20, and the responses thereto, it is hereby ORDERED that Respondent's Motion, is DENIED in part and GRANTED in part. The motion for reconsideration is denied and the motion for an immediate appeal is granted.

The court certifies that this order involves controlling questions of law on which there are substantial grounds for difference of opinion and an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

In finding petitioner's federal *habeas* petition was timely filed, this Court decided two questions of controlling law:

1. Do the enumerated exceptions to Pennsylvania's PCRA statute of limitations, 42 PA. CONS.STAT.ANN. § 9545(b)(1), prevent a late state post collateral petition from being necessarily "improperly filed" for purposes of 28 U.S.C. § 2244(d)(2)?
2. Does the confluence of the following factors constitute "extraordinary circumstances" for purposes of equitably tolling AEDPA's one year statute of limitations: (1) the uncertainty of Pennsylvania law at the time that petitioner had to choose whether to file a state or federal *habeas* petition; (2) the lack of notice of forfeiture to petitioner of his right to federal review of his conviction and sentence; (3) the fact that petitioner would not have been allowed to proceed in federal court at the time he would have been required to file his federal *habeas* petition in order to preserve his federal rights; (4) and petitioner's sentence is life without the possibility of parole?

Answers to these questions will determine whether consideration of the substantive issues raised in the petition is appropriate.

Proceedings are stayed in the district court pending the action by the court of appeals on this certification.

2002 WL 485689 (E.D.Pa.)

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Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

December 31, 2003

Mr. Billy H. Nolas
Defender Association of Philadelphia
The Curtis Center, Suite 545-West
Independence Square West
Philadelphia, PA 19106

Re: John A. Pace
v. Donald Vaughn, et al.
Application No. 03A540

Dear Mr. Nolas:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on December 31, 2003 extended the time to and including March 4, 2004.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by

Ruth Jones
Case Analyst

ORIGINAL

(8)

RESPONSE REQUESTED

FILED
AUG 16 2004
OFFICE OF THE CLERK

No. 03-9627

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN A. PACE,
Petitioner,

v.

David DiGuglielmo
~~DONALD T. VAUGHN~~, et al.,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FILED
AUG 19 2004

QUESTIONS PRESENTED

1. Where the Third Circuit merely applied this Court's decision in *Carey v. Saffold*, 536 U.S. 214, 226 (2002), holding that an untimely state petition for collateral review does not toll the deadline for filing a federal habeas corpus petition, is petitioner entitled to the grant of review on the grounds of a purported circuit conflict?

2. Should this Court grant review of petitioner's claim that his purported mistake of law mandated "equitable tolling" of the deadline for filing a federal habeas corpus petition?

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II. Review is unwarranted for petitioner's alternative contention that he entitled to equitable tolling of the federal habeas deadline, where the only "inequity" he claims is that he made a mistake of law in guessing that he would receive statutory tolling during the pendency of his facially untimely state post-conviction petition. 15

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COUNTERSTATEMENT OF THE CASE[1]

On September 18, 1985, while robbing a random pedestrian of a brown-bag lunch, petitioner beat his victim to death with a blackjack. N.T. 2/13/86 at 45-74. On February 13, 1986, after a thorough and valid guilty-plea colloquy, petitioner pleaded guilty to second-degree murder and possessing an instrument of crime (PIC) before the Honorable David N. Savitt in the Philadelphia Court of Common Pleas (Bill Nos. 1272 and 1275, October Term, 1985). Id. at 26-67. Following further discussion, Judge Savitt imposed a mandatory life sentence for murder plus one to two years for PIC. Id. at 68-72. Thereafter, the Court reviewed counsel's request for placement in a rehabilitative facility and explained petitioner's appellate rights. Id. at 72-75. Petitioner did not file a direct appeal. His sentence became final in March of 1986.

On August 21, 1986, petitioner filed *pro se* his first state post-conviction petition under subchapter B, chapter 95, title 42 Pa.C.S. § 9541 *et seq*. (then titled the Post Conviction Hearing Act (PCHA)).[2] Counsel was appointed and filed an amended petition on March 11, 1987. After a hearing, counsel was permitted to withdraw. New counsel was appointed and filed another amended petition on October 27, 1989. The court held a hearing on March 26, 1991, at which petitioner testified that he had not known what it meant to be sentenced to life imprisonment. On July 23, 1991 (not 1992, *see* Petition for Writ of Certiorari ("Petition") at 2), the court dismissed the PCHA petition. Petitioner appealed to the Pennsylvania Superior Court, which affirmed in an unpublished memorandum on March 30, 1992.[3] That ruling became final when petitioner failed to seek discretionary review in the Pennsylvania Supreme Court within the 30-day filing period. Petitioner subsequently filed a Petition for Permission to File Petition for Allowance of Appeal *Nunc Pro Tunc*; it was denied on September 2, 1992. *Commonwealth v. Pace*, No. 81 E.D. Misc. Dkt. 1992. Thus, petitioner's first state post-conviction petition was pending from 1986 to 1992.

On November 17, 1995 (not in 1996, *see* Petition at 2), Pennsylvania's legislature amended subchapter B, chapter 95, title 42 Pa.C.S. § 9541 *et seq.* (then titled the Post Conviction Relief Act (PCRA)) to provide, in pertinent part:

> § 9545. **Jurisdiction and proceedings**
>
> (a) Original jurisdiction.—Original jurisdiction over a proceeding under this subchapter shall be in the court of common pleas. No court shall have authority to entertain a request for any form of relief in anticipation of the filing of a petition under this subchapter.
>
> (b) Time for filing **petition**.—
>
> (1) Any **petition** under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes

---

[1] Petitioner inappropriately interjects argument for equitable tolling within his Statement of the Case. Petition at 2-6. That argument is answered below, in Argument section II.

[2] The petition alleged, *inter alia*, that trial counsel had been ineffective, and that petitioner's guilty plea had been unlawfully induced. PCHA Petition at 3.

[3] The Superior Court, A72-76, found meritless petitioner's claims that he was "misled into entering his guilty plea by the statements and advice of his counsel and by the statements of the court [because he] did not know that a life sentence in Pennsylvania means a life sentence without the possibility of parole." A73. The Superior Court determined that the guilty plea court properly informed petitioner that he would receive a life sentence. The court held that the guilty plea colloquy was not confusing, noting that "a life sentence in Pennsylvania means a life sentence -- nothing more, nothing less," i.e., without parole, although there is always "the possibility that the governor could commute the life sentence to a term of years," A74 & A74 n.3. The court held that a passage in which the trial court referred to release, *i.e.*, commutation, could not have misled petitioner because the reference occurred "after the court had accepted appellant's guilty plea and had moved on to sentencing" A74 n.4. The Superior Court also found that, even if petitioner had possessed any misunderstanding on the issue before the plea, the colloquy made it "complete and quite clear that a life sentence would be imposed and that no other agreements or negotiations would be considered." A75.

final, unless the **petition** alleges and the petitioner proves that:

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any **petition** invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

42 Pa.C.S. § 9545 (in part) (effective January 16, 1996) (emphasis added). An integral and applicable part of the statute, which petitioner does not mention, provides a savings clause for first petitions:

> [T]he amendment of ... [these provisions] shall apply to **petitions** filed after the effective date of this act; however, a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition under 42 Pa.C.S. Ch. 95 Subch. B if the petitioner's **first petition** is filed within one year of the effective date of this act.

Note, 42 Pa.C.S. § 9545 (emphasis added). This provision was passed by the General Assembly and signed into law by this Commonwealth's Governor with the rest of the PCRA amendments, which were published in advance of their effective date. The time-limit was designed to prevent the filing of repetitive petitions and to serve the important principle that "[a]t some point, litigation must come to an end." *Commonwealth v. Peterkin*, 722 A.2d 638, 643 (Pa. 1998).

At approximately the same time, the same motive animated that portion of the

Anti-Terrorism and Effective Death Penalty Act ("AEDPA") of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), which amended the federal habeas statute at 28 U.S.C. §§ 2241 *et seq.*, effective April 24, 1996, to include a one-year statute of limitations. That time-bar also contains several "exception" start-dates, with tolling during the pendency of any "properly filed" state post-conviction relief petition. 28 U.S.C. § 2244(d). *Woodford v. Garceau*, 538 U.S. 202, 206 (2003), discussing *Williams v. Taylor*, 529 U.S. 362 (2000). That statute, too, was published well before its effective date.

Thus, petitioner **was on notice** of both the state PCRA and federal habeas filing deadlines – including both statutes' exceptions – well before his federal habeas filing deadline, which was April 23, 1997. A17 (Report and Recommendation); *Pace-3*.

Nonetheless, on November 27, 1996, petitioner filed a second state post-conviction petition, reiterating the same claims he had exhausted in his 1986 PCHA petition.[4] Under the provisions of the statute above, his 1996 petition was untimely; his first petition under subchapter B had been filed in 1986, so the "grace period" did not apply. He made no claim within his 1996 petition that any of the time-bar exceptions applied.

After the filing, the trial court appointed counsel to represent the petitioner. On June 13, 1997, counsel filed a petition to withdraw and a "no-merit" letter under *Com-*

[4] He claimed, *inter alia*, that his guilty plea was unlawfully induced because "[n]either the court nor counsel ensured that Defendant understood that a consequence of his plea could or would be imposition of that term of life imprisonment without a minimum sentence for parole eligibility," that his life sentence was illegal because it really meant life without parole, and that all prior counsel were ineffective for failing to litigate these issues. PCRA Petition at 3-4. He falsely stated that the state courts had not passed upon these claims. PCRA petition at 6.

Petitioner's present certiorari petition focuses upon the state and federal courts' subsequent procedural treatment of this 1996 PCRA petition, but he fails to mention that the claims in it had **already been exhausted** in state court.

monwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988), *on remand from Pennsylvania v. Finley*, 481 U.S. 551 (1987), explaining that the 1996 PCRA petition's claims were meritless and were all but identical to those asserted in the 1986 PCHA petition.[5] The Commonwealth took no position. On July 23, 1997, Judge Savitt granted withdrawal and dismissed the PCRA petition based on the *Finley* letter. Petitioner appealed *pro se* to the Pennsylvania Superior Court, and on July 29, 1997, Judge Savitt issued an opinion explaining that he had denied the PCRA petition for the reasons in the *Finley* letter, because the "identical issue was not only raised and decided in a collateral proceeding but also reviewed by the Superior Court and decided against petitioner," and because "[p]etitioner's guilty plea colloquy was thorough and compete, petitioner answered every question indicating that he understood and there is no showing on the record of the previous collateral proceedings that petitioner was misled by trial counsel." A79 (PCRA court opinion).

Petitioner appealed the dismissal of his second post-conviction petition. In his April 8, 1998 brief to the Pennsylvania Superior Court, petitioner reiterated his issue: invalid life sentence, invalid guilty plea induced by his alleged misunderstanding of the fact that life means life in Pennsylvania, and ineffectiveness of all prior counsel for allowing this to occur. Superior Court brief at 6-7.

---

[5] The *Finley* letter reported that petitioner's claims were (1) whether he was "misled into entering his guilty plea" and (2) whether "trial counsel was ineffective for failing to properly advise him of the consequences of his guilty plea" and prior PCHA/PCRA counsel was ineffective for "failing to subpoena trial counsel to testify at the evidentiary hearing." A99 (*Finley* letter). Counsel concluded that petitioner "arrives at the Post Conviction Relief Act stage of his legal journey having fully and completely had an opportunity to litigate all issues, real and imagined, in his case before the Pennsylvania Courts (Common Pleas Court, Superior Court, and Petition to the Supreme Court)." *Id.* at A102-103.

In response the Commonwealth argued that the 1996 PCRA petition had been untimely, asking that the "clear and unambiguous" PCRA time-bar (quoted above) "be given effect in accordance with its plain and obvious meaning" under state precedent. A116 (Commonwealth's brief). On December 3, 1998, the Pennsylvania Superior Court agreed, finding that the 1996 collateral petition had been untimely and that the PCRA court had therefore lacked jurisdiction. A80-86 (Superior Court opinion). It added that state law entitled it to affirm the PCRA dismissal on a different ground than that utilized by the PCRA court. *Id.* at A86 n.4. The Superior Court cited *Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa. Super. 1997), and *Commonwealth v. Perry*, 716 A.2d 1259 (Pa. Super. 1998), in each of which a trial-level PCRA court had similarly mistakenly acted upon an untimely-filed PCRA petition but on appeal was found to have lacked jurisdiction. *Id.* at A85. The appellate court further found that petitioner had asserted none of the PCRA time-bar exceptions and that none applied. *Id.* at A85-86.

On December 15, 1998, petitioner filed for reargument in the Superior Court, asserting for the first time a PCRA time-bar exception. 42 Pa.C.S. § 9545(b)(1)(i) (reproduced above). A104-112. The Commonwealth answered that Pennsylvania Rule of Appellate Procedure 302(a) prohibited him from raising new issues on reargument.[6] A113. The Superior Court denied reargument. A122. The Pennsylvania Supreme Court denied

---

[6] The PCRA time-bar statute also requires that any exception be alleged in the PCRA petition itself; jurisdiction to consider such a petition resides in the trial court alone. 42 Pa.C.S. § 9545(a) and (b). Any exception has a 60-day deadline tied to the filing date of the petition in which it is asserted. 42 Pa.C.S. § 9545(b)(2). Petitioner filed his reargument petition in the Superior Court over two years after filing his PCRA petition in the Court of Common Pleas. Further, the only way to invoke this exception under the PCRA statute is to offer proof. 42 Pa.C.S. § 9545(b)(1). New evidence may not be presented to the Superior Court. Pa. R. App. P. 302(a).

review on July 29, 1999. *Commonwealth v. Pace*, 740 A.2d 1146 (Pa. 1999) (table). A124.

On December 22, 1999, petitioner executed[7] his federal petition for writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania under 28 U.S.C. § 2254(d), initiating the present action.[8] Respondents replied that the habeas petition was untimely under 28 U.S.C. § 2244(d) and should be dismissed. On April 28, 2000, Magistrate Judge M. Faith Angell filed a Report and Recommendation (R&R) concluding that petitioner was not entitled to statutory tolling for his untimely 1996 PCRA petition, and that his habeas petition was therefore untimely. A11-19 (R&R). Magistrate Judge Angell concluded that the federal statute of limitations for filing a habeas petition had run from April 24, 1996, until it expired on April 23, 1997, under *Burns v. Morton*, 134 F.3d 109 (3d Cir. 1998). A17. Petitioner's untimely 1996 PCRA petition did not toll the running of the statute because it was not "properly filed" under state law. A18.

Over one year later, on June 7, 2001, in a published opinion, Chief Judge Giles found the habeas petition timely, granting petitioner both statutory and equitable tolling. The judge rejected as binding the Third Circuit's recent precedent on the issue, *Fahy v. Horn*, 240 F.3d 239 (3d Cir. 2001), *cert. denied sub nom Horn v. Fahy*, 534 U.S. 944

[7] The Third Circuit applies the "mail box" rule of *Houston v. Lack*, 487 U.S. 266 (1988), to *pro se* habeas petitions. *Burns v. Morton*, 134 F.3d 109 (3d Cir. 1998).

[8] In his petition, he claimed that his guilty plea was unlawfully induced and unknowingly entered because trial counsel purportedly misled him into thinking his life sentence would be less than a life sentence, habeas petition at 7 and 7 reverse (¶12.A); that counsel was ineffective for this, habeas petition at 8 and 8 reverse (¶12.B); and that his rights to due process, equal protection, the effective assistance of counsel, and against cruel and unusual punishment were all violated by his allegedly illegal life sentence, habeas petition at 8 and 8 reverse (¶12.C). These are the same claims he exhausted in his 1986 PCHA and round of state appeal and that he re-asserted in his time-barred 1996 PCRA and round of state appeal.

(2001). In the *Fahy* case, the Third Circuit had rejected statutory tolling for untimely state collateral petitions. The appeals court had further ruled that an alleged mistake of law – identical to that presented here – might justify equitable tolling, but only in a capital case, never in a non-capital case. Nevertheless, Judge Giles found tolling, ruling that just as "death is different," life is different too.

The Commonwealth sought reconsideration and/or certification to appeal the interlocutory order. Nine months later, in a superseding second memorandum and order, the district court denied reconsideration but granted respondents permission to appeal. *Pace-2*. Granting certification to appeal, the district court found "substantial grounds for difference of opinion" on whether *Fahy* had prohibited statutory and equitable tolling under the circumstances of this case. Respondents appealed, arguing that *Fahy* squarely controlled both points.

In the interim, the Third Circuit decided *Merritt v. Blaine*, 326 F.3d 157 (3d Cir.), *cert. denied*, 124 S.Ct. 317 (2003), which, relying on *Fahy*, reiterated that an untimely state collateral petition did not create statutory tolling, and that an alleged mistake of law like petitioner's did not justify equitable tolling in a non-capital case. Petitioner acknowledged in the court of appeals that *Merritt* was "'materially indistinguishable'" from his own case. *Pace-3* at 129. Accordingly, on July 30, 2003, the Third Circuit reversed the district court's ruling and ordered petitioner's habeas petition dismissed.

REASONS FOR DENYING THE WRIT

I. Where the Third Circuit merely applied this Court's decision in *Carey v. Saffold*, 536 U.S. 214, 226 (2002), holding that an untimely state petition for collateral review does not toll the deadline for filing a federal habeas corpus petition, petitioner is not entitled to the grant of review.

Petitioner made no request in his state collateral petition for applying any of the exceptions to the one-year time limit provided in Pennsylvania law. *See* Pennsylvania Post-Conviction Review Act (PCRA), 42 Pa. C.S. § 9545(b). Because that petition was plainly filed beyond the deadline, it was dismissed by the state courts, which as a matter of state law are without jurisdiction to consider post-conviction petitions that are untimely. Accordingly, the Third Circuit Court of Appeals declined to give tolling effect to the state petition for purposes of the deadline for filing a federal habeas corpus petition. 28 U.S.C. § 2244(d)(2)(tolling permitted only for "properly filed" state collateral petitions).

In requesting review before this court, petitioner now argues that the **mere presence** of exceptions within the PCRA time-bar statute – or in any state's time-bar statute – creates the possibility of judicial review. Such review, contends petitioner, may involve consideration of some aspect of the merits of the state petition. Therefore, concludes petitioner, a state petition, even if untimely, is "properly filed" for purposes of § 2244(d)(2), and so **every** untimely PCRA petition filed in Pennsylvania – or in any state with a similar statute – tolls the deadline for seeking federal habeas corpus review. Petitioner claims that the weight of authority in the circuit courts follows this dubious reasoning.

This Court, however, has already eliminated the premise of petitioner's position in *Carey v. Saffold*, 536 U.S. 214 (2002), which held that untimely state petitions for collateral review do *not* toll the time for seeking federal habeas review under 28 U.S.C. §

2244(d)(2). There, the California high court denied a state petition for collateral review both on the merits and for "lack of diligence." The latter phrase might have indicated that the court found the petition to be untimely under that state's indeterminate deadline. Saffold subsequently filed a federal habeas petition, seeking tolling of the federal filing deadline for the period between the filing of his state collateral petition and its rejection by the California Supreme Court. The Ninth Circuit held that, because the California court had referred to the merits in denying the state petition, the state court must have found the petition timely. *Id.* at 225. This Court disagreed:

> A court will sometimes address the merits of a claim that it believes was presented in an untimely way.... Given the variety of reasons why the California Supreme Court may have included the words "on the merits," those words cannot by themselves indicate that the petition was timely.

Id. at 225-26 (citations omitted). It remained unclear whether by also denying for "lack of diligence," the state court had been referring to unreasonable delay in filing, the equivalent of an "untimely appeal" finding in other states. This Court remanded for an answer to that question, *id.* at 227, holding that:

> If the California Supreme Court had clearly ruled that Saffold's 4 1/2-month delay was "unreasonable," **that would be the end of the matter**, regardless of whether it also addressed the merits of the claim, or whether its timeliness ruling was "entangled" with the merits.

Id. at 226 (emphasis added). This Court thus finds conclusive a state court's judgment on its own filing requirements – including deadlines that are not absolute and require judicial scrutiny, such as California's. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas court to reexamine state-court determinations on state law questions").

Petitioner claims that *Saffold* can be ignored because it addressed only whether

the state petition in question was "pending" while it was before the California Supreme Court, not whether it was "properly filed" before that court. *See* 28 U.S.C. § 2244(d)(2). But petitioner fails to explain how the petition could have been properly filed yet never pending. If, as *Saffold* holds, an untimely state post-conviction petition was never even pending for purposes of § 2244(d)(2), then it could not have been properly filed. By the same token, if the petition had been properly filed, then it would be pending until its resolution.

To avoid this problem, petitioner suggests that time limits on state collateral petitions may be altogether immune from the "proper filing" requirements of § 2244(d)(2). He points to this Court's previous § 2244(d)(2) decision in *Artuz v. Bennett*, 531 U.S. 4 (2000), which, he asserts, "explicitly declined to address" the issue of whether "**time** limits on state post-conviction proceedings" will "prevent a state post-conviction petition from being 'properly filed.'" Petition at 13 (emphasis in original). That is false. In describing the "proper filing" requirements contemplated by § 2244(d)(2), the Court stated specifically that "[t]hese usually prescribe, for example ... the **time limits** upon its delivery." *Id.*, 531 U.S. at 8 (emphasis added) (citing, *inter alia*, *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998)) (Pennsylvania PCRA timely filing statute is an example of a proper filing requirement).

The only question remaining after *Artuz* was whether untimely state court petitions could nonetheless toll under § 2244(d)(2) if the timeliness question was subject to judicial review, including possible review involving the merits. This Court's holding in *Saffold* resolves that question: if a state court were to rule a collateral petition untimely, "that would be the end of the matter, regardless of whether it also addressed the merits of

the claim, or whether its timeliness ruling was 'entangled' with the merits." 536 U.S. at 226.

In light of *Saffold*, petitioner's discussion of the state of circuit court authority is irrelevant; but it is also inaccurate. Petitioner claims that most of the circuits reject the Third Circuit's application of *Saffold*. In fact, only one circuit is clearly in conflict – the Ninth – while several are exactly in accord.

As petitioner acknowledges, the Seventh[9] and Third[10] Circuits have both concluded that, under *Saffold*, an untimely state collateral petition does not toll the federal habeas deadline, whether or not the state time-bar allows for judicial review of possible exceptions.

The Sixth Circuit agrees with this result, though it has not explicitly addressed *Saffold*.[11]

The Fourth Circuit has similarly found that *Saffold* means that judicially-created

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[9] *Brooks v. Walls*, 279 F.3d 518 (7th Cir. 2002), *reh'g & reh'g en banc denied, Brooks v. Walls*, 301 F.3d 839 (7th Cir. 2002), *cert. denied*, 538 U.S. 1001 (2003).

[10] *Pace-3; Merritt, supra; Fahy, supra; Lovasz, supra.* Even a liberal student critic of the AEDPA, arguing stridently against its time-bar, agrees that after *Saffold*, "[a]ny state petition found to be untimely under the state procedural rules will not qualify as 'properly filed' (addressing the dissent's concerns) under the AEDPA and so the issue of tolling is foreclosed." Karen M. Marshall, *Note: Finding Time for Federal Habeas Corpus: Carey v. Saffold*, 37 Akron L. Rev. 549, 584 (2004). She finds, "The Third Circuit has definitively followed *Carey*." *Id.* at 584 n.194.

[11] *Vroman v. Brigano*, 346 F.3d 598, 601-604 (6th Cir. 2003) (post-*Saffold*, habeas petition untimely because no statutory tolling for Ohio post-conviction motion ruled untimely under time-bar with exceptions); *Israfil v. Russell*, 276 F.3d 768 (6th Cir. 2001) (pre-*Saffold*, habeas petition untimely because third Ohio post-conviction motion not properly filed since ruled untimely under exception-containing deadline); *State v. Israfil*, 1999 WL 960971 (Ohio App. 2 Dist. 1999) at *3 (exceptions). *See Keenan v. Bagley*, 262 F.Supp.2d 818, 822 (N.D. Ohio 2002) (*Smith/Dictado* inconsistent with *Israfil*).

exceptions do not undermine a state filing deadline.[12]

Petitioner cites the Eleventh Circuit as one court going the other way, but in reality that circuit's precedent is at best unclear. Petitioner relies on *Siebert v. Campbell*, 334 F.3d 1018 (11th Cir. 2003). *Siebert*, however, claims that its position is in accord with the Seventh Circuit. *Id.* at 1030-31. And a more recent decision addressing untimeliness under § 2244(d)(2) further suggests lack of confidence in the rationale argued by petitioner.[13]

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[12] Answering an argument that a state petition was "pending" until after a rehearing period, where rehearing was not available, but the court sometimes ignored that rule, it wrote:

> Rouse contends that, notwithstanding Rule 31(g), rehearing was available because the Supreme Court of North Carolina has "used its discretionary authority to reconsider denials" of such petitions. (Reply Br. at 10.) Rouse, however, did not seek such review. Moreover, the fact that North Carolina sometimes suspends or creates **exceptions** to its procedural rules does not mean that the state proceeding was "pending." *Cf. Carey*, 536 U.S. at 223-25 (noting that there would be no tolling of the statute of limitations during time that a prisoner might file a petition for an original writ of habeas corpus in a state supreme court where the original writ procedure is only exercised in extraordinary cases); *Allen v. Mitchell*, 276 F.3d 183, 185-86 (4th Cir. 2001) (no tolling of statute of limitations for time after appeal period ended and before untimely petition was actually under consideration by state court even though "state courts frequently suspend or create exceptions to their procedural rules, and . . . review may therefore be available even after deadlines have expired" and even though the state court did in fact consider the untimely petition for appellate review).

Rouse v. Lee, 339 F.3d 238, 244 (4th Cir. 2003) (en banc), *cert. denied*, ___ U.S. ___, 124 S.Ct. 1605 (2004) (emphasis added).

[13] Just because there are objectively defined exceptions -- whether in a statute or judicially created -- does not mean the procedural rule stated in O[fficial] C[ode of] G[eorgia] A[nnotated] § 9-14-52(b) becomes discretionary and not jurisdictional.

Wade v. Battle, ___ F.3d ___, 2004 U.S. App. LEXIS 16244 at *26 n.8 (11th Cir., Aug. 6, 2004).

The Fifth Circuit, on which petitioner also relies, in fact appears to have acknowledged the impact of *Saffold*, but has distinguished it on the ground that the state post-convictions under review were denied entirely on the merits, and were never found untimely in state court.[14]

Petitioner claims that the Second Circuit "seems" to have endorsed his approach in its decision in *Robinson v. Ricks*, 56 Fed. Appx. 7 (2d Cir. 2003) (not precedential). In fact, the circuit there simply granted a motion to remand to the district court for reconsideration in light of *Saffold*.

Thus, the Ninth appears to be the only Circuit that, after *Saffold*, continues to apply the view that the mere presence of exceptions in a time-bar statute renders every untimely-ruled post-conviction petition "properly filed" for federal habeas purposes. The Ninth Circuit is alone and in error in this regard, but that error is no reason to grant certiorari in this case, in which the Third Circuit did not err.

Here, the PCRA time-bar statute was applied by the state courts to find petitioner's PCRA petition untimely. That is "the end of the matter." *Saffold*, 536 U.S. at 226. There is thus no need to grant the writ of certiorari on the statutory tolling question.

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[14] *Grillette v. Warden*, 372 F. 3d 765 (5th Cir. 2004); *Dixon v. Cain*, 316 F.3d 553 (5th Cir. 2003).

II. Review is unwarranted for petitioner's alternative contention that he entitled to equitable tolling of the federal habeas deadline, where the only "inequity" he claims is that he made a mistake of law in guessing that he would receive statutory tolling during the pendency of his facially untimely state post-conviction petition.

Petitioner provides no recognized reason that this Court should grant certiorari regarding his bid for equitable tolling. *Compare* Supreme Court Rule 10 *with* Petition at 27-34. He says he thought he had a reason for choosing to re-exhaust his claims in his untimely 1996 state PCRA petition, instead of filing a timely federal habeas petition then: that the PCRA time-bar would not be upheld literally but would be ignored by the state courts. Had that transparently unlikely event occurred, the state petition would have been "properly filed" under § 2244(d)(2) and the federal habeas deadline would have been tolled. The fact petitioner's hoped-for resolution did not occur, however, is not unfair or even unusual; nor is there anything unfair about the Third Circuit's refusal to grant equitable tolling for his mistake of law. He points to **no** other Circuit that would toll under these circumstances. Even if equitable tolling does apply to the federal habeas statute, it cannot apply here, as the Third Circuit found. *Pace-3*. The Court, therefore, need not review this question.

This Court has not yet had occasion to address whether equitable tolling is available within the federal habeas time-bar context.[15] Even if it does apply to the habeas

[15] Several Justices of the Court have suggested equitable tolling might be appropriate in some habeas contexts. *See e.g., Pliler v. Ford*, ___ U.S. ___, ___, 124 S.Ct. 2441, 2448 (2004) (O'Connor, J., concurring); *Duncan v. Walker*, 533 U.S. 167, 182 (2001) (Souter, J., concurring) and (Stevens, J., concurring in part and concurring in the judgment), and at 192 (Breyer, J., dissenting, joined by Ginsburg, J.). Still, it is arguable that equitable tolling should not apply to the habeas statute at all. By adopting a federal statute establishing defi- (continued)

time-bar, however, it still cannot excuse petitioner's lateness. His only argument is that he made a reasonable mistake of law by choosing to file a second, time-barred PCRA petition in 1996, in which he re-asserted his already-exhausted claims, instead of filing a timely federal habeas petition in 1996 containing those already-exhausted claims, which

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nite filing limits for certain actions, "Congress was entitled to assume that the limitation period it prescribed meant just that period and no more." *Soriano v. United States*, 352 U.S. 270, 276 (1957). Equitable tolling is prohibited where the statutory language allows for no supplemental timeliness exceptions, or where the purposes and logical coherence of the statute would be undermined by it. *See Irwin v. Department of Veterans' Affairs*, 498 U.S. 89, 95-96 (1990). "Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute." *United States v. Beggerly*, 524 U.S. 38, 48 (1998) (citing *United States v. Brockamp*, 519 U.S. 347 (1997)). In *Brockamp*, as in *Irwin*, this Court asked: "Is there good reason to believe that Congress did **not** want the equitable tolling doctrine to apply?" *Brockamp*, 519 U.S. at 350 (emphasis in original).

There is good reason here. Congress included three alternative starting dates, incorporating equitable tolling exceptions **within** the habeas statute of limitations. 28 U.S.C. § 2244(d)(1)(B-D). *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) (where "Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."). Further, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). This general interpretive principle, "*expressio unius est exclusio alterius*," is valid where its application indicates Congressional intent and yields an interpretation consistent with the language, purpose, and policy of the relevant statute. *See Andrus*. An examination of AEDPA's provisions concerning capital cases shows Congress did not intend the doctrine to apply under Section 2244(d). Under Title I, Section 107 of AEDPA, Congress added a new Chapter 154 to Title 28 of the United States Code, entitled "Special Habeas Corpus Procedures in Capital Cases." New Section 2263 of Title 28 specifically addresses the filing of capital habeas applications and sets forth strict and detailed timeliness requirements in those capital cases governed by Chapter 154. Section 2263(b) describes conditions for tolling of the filing requirements. Congress chose to include among these tolling conditions a general "catch all" provision at Section 2263(b)(3)(B), which specifies that a habeas filing may be tolled during an additional period not to exceed 30 days, if "a showing of **good cause** is made for the failure to file the habeas corpus application within the time period established by this section." (Emphasis added.) This type of exception – essentially a general equitable tolling provision – was **not** included by Congress in Section 2244(d). Applying the *exclusio unius* principle, it follows that Congress did **not** intend a general "good cause" exception to apply to Section 2244(d). *See Russello, supra*; *Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

would have been reviewed on the merits. Even if his alleged mistake in thinking the PCRA time-bar statute did not mean what it literally said when it was published could be characterized as reasonable, his own **choice** did not **prevent** him from filing -- and it is thus not sufficient to justify equitable tolling.[16]

For equitable tolling to apply, this Court requires that some unusual obstacle outside of a petitioner's own control must have prevented him or her from filing on time despite the exercise of reasonable diligence. *See Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (*per curiam*) (list of obstacles includes inadequate notice of trigger for suit, a pending motion, an action of the court misleading a petitioner into thinking all that is required has been completed, or affirmative misconduct by plaintiff). *See also Irwin v. Department of Veterans' Affairs*, 498 U.S. 89, 95-96 (1990) (obstacles include filing a defective pleading during statutory period). During the relevant tolling period, including after the obstacle to filing is removed, the petitioner must exercise reasonable diligence in attempting to file on time. "One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin*, 466 U.S. at 151. The Third Circuit followed that law here. *Pace-3* at 129.

By choosing to file only a second state post-conviction petition in November of

[16] When petitioner filed his time-barred PCRA petition on November 27, 1996, the PCRA time-bar had been published for one year and had been in effect for ten months, and the published federal habeas time-bar had been in effect for seven months. When petitioner filed his time-barred federal habeas petition on December 27, 1999, the federal habeas time-bar had been in effect for over three and one-half years. Yet petitioner argues to this Court that he should be granted equitable tolling because when he filed his time-barred PCRA petition, the PCRA time-bar had not yet come into existence ("That change in state law, however, occurred long **after** Petitioner filed his PCRA petition"), and PCRA review still "reasonably appeared to be available," and that he filed "within the AEDPA year," directly contradicting the AEDPA statute. Petition at 29. All of this is incorrect.

1996 and not also (or instead) a federal habeas petition by his April 1997 deadline, petitioner speculated that the state and federal courts would not apply the plain language of the PCRA time-bar and federal habeas time-bar straightforwardly despite his colorable argument that they should not. All he complains of today is that they did. That is not a reason for equitable tolling, and it is not worthy of certiorari.

"[T]he principles of equitable tolling described above do not extend to what is at best a garden variety claim of excusable neglect." *Irwin* at 96. Mistakes about, or ignorance of, the law amounts only to **in**excusable neglect. *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 392 (1993) ("inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect"); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463-64 (8th Cir. 2000) (district court abused its discretion by concluding miscalculation of the date on which notice of appeal was due was "excusable neglect"). Every Circuit known to respondents to have considered the question has found that legal mistakes, whether by a petitioner or the petitioner's attorney, do not justify equitable tolling.[17] Unless publica-

[17] *See U.S. v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004) (petitioner's "misconception about the operation of the statute of limitations is neither extraordinary nor a circumstance external to his control"); *Nolan v. U.S.*, 358 F.3d 480 (7th Cir. 2004) (contrary interpretation of the law by prisoner insufficient for equitable tolling); *Cross-Bey v. Gammon*, 322 F.3d 1012, 1015 (8th Cir. 2003) ("Even in the case of an unrepresented prisoner alleging a lack of legal knowledge or legal resources, equitable tolling has not been warranted.") (quotation marks omitted); *Cousin v. Lensing*, 310 F.3d 843 (5th Cir. 2002) ("a petitioner's ignorance or mistake is insufficient to warrant equitable tolling") (citation omitted); *Smaldone v. Senkowski*, 273 F.3d 133, 138-39 (2d Cir. 2001) (attorney's mistake about deadline does not justify tolling), *Delaney v. Matesanz*, 264 F.3d 7, 15 (1st Cir. 2001) (*pro se* prisoner misreading the law does not justify equitable tolling); *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000), *cert. denied*, 531 U.S. 1194 (2001) (ignorance of law no reason for tolling); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) ("[a]ny miscalculation or misinterpretation by Steed's attorney in interpreting the plain language of the statute does not constitute an extraordinary (continued)

tion notice is invalid, petitioner had a duty to read and heed the published state and federal time-bars; where such a duty exists, ignorance of the law cannot suffice as an excuse.

Even if petitioner was "confused" and there was some legal uncertainty, a lack of certainty in law is not an extraordinary circumstance that poses an obstacle to filing, as the Third Circuit found. *Pace-3* at 129. It is, in fact, a universal condition; otherwise, lawyers would be unnecessary.[18] Every deadline, and every rule, whether or not it contains express exceptions, is subject to legal argument about its applicability in individual cases. That not only may require some level of judicial review -- it always will require some degree of uncertainty. It is impossible to design a deadline statute, or any law, that is not susceptible to argument about its applicability in exceptional circumstances.

Further, as the Seventh Circuit has stated:

> The petitioners' argument that the deadline was unclear also makes no sense, because if it was unclear, they should have filed by the earliest possible deadline, not the latest. The deadline simply was missed. That is not grounds for equitable tolling.

United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000). That is, as the Third Circuit correctly found, petitioner did not exercise reasonable diligence in attempting to file and thus would not qualify for equitable tolling in any event – even if mistake of law could generally be grounds. *Pace-3*. He claims that the lack of published cases upholding the statute caused his confusion that prevented him from filing. But even if that was such an obstacle (which is denied), he did not file promptly after December 17, 1997, the date on which the Pennsylvania Superior Court issued the first published state cases applying the 1996 PCRA time-bar. *Pace-3* at 129 and 129 n.1, citing *Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa. Super. 1997), and *Commonwealth v. Conway*, 706 A.2d 1243 (Pa. Super. 1997). Instead, he waited to file his federal habeas petition for **over two years**[19] after those cases were published.

Thus, equitable tolling could never apply here. No obstacle prevented petitioner from filing in 1996, when his claims were ripe for review; his mistake of law is no reason for tolling. Further, he was not reasonably diligent in attempting to file even after his claimed obstacle to filing – the lack of cases upholding the time-bar – was removed.

In any event, petitioner is incorrect, even as a matter of state law, in claiming that he could not reasonably have understood that his state post-conviction petition would be dismissed as untimely, and thus that his federal habeas deadline would not be statutorily

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circumstance sufficient to warrant equitable tolling"); *United States v. Baker*, 197 F.3d 211, 218-19 (6th Cir. 1999) (accepting ignorance of the law as an excuse would encourage and reward indifference to the law); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (lawyer's mistake does not warrant tolling); *Hughes v. Idaho State Bd. of Corrections*, 800 F.2d 905, 909 (9th Cir. 1986) (illiteracy and ignorance of law not cause excusing default); *School District of Allentown v. Marshall*, 657 F.2d 16, 20-21 (3d Cir. 1981) ("ignorance of the law is not enough to invoke equitable tolling"); *U.S. v. Erdoss*, 440 F.2d 1221 (2d Cir. 1971) ("Generally a party who makes an informed choice will not be relieved of the consequences when it subsequently develops that the choice was unfortunate") (citation omitted). *See also Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) (refusing to excuse lay persons from compliance with Title VII statute of limitations, even though some courts of appeals had adopted a more lenient interpretation of the time limit).

[18] There is nothing unfair about having to choose among available but not infallible legal strategies. That is the position in which virtually all litigants find themselves. As Justice Souter wrote for a unanimous Court, "The virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule." *Rotella v. Wood*, 528 U.S. 549, 561 (2000). *See also Reed v. Mokena School District No. 159*, 41 F.3d 1153, 1155 (7th Cir. 1994) ("The unsettled state of the law, standing alone, is not sufficient to trigger the invocation of equitable principles"). From the beginning, petitioner faced an obvious, significant, unavoidable risk that a PCRA petition filed after the expiration of the state statutory deadline would be dismissed – and that if he did not file his habeas petition by a deadline calculated with the assumption that the untimely PCRA would not toll the federal statute of limitations, it would be dismissed for untimeliness as well. He chose to ignore those risks.

[19] Petitioner filed his current habeas petition on December 27, 1999.

tolled. His argument, based primarily upon two law review articles,[20] is inaccurate and depends upon merging two categories: conditions to filing, and conditions to obtaining relief.[21]

This merger of categories requires petitioner to engage in the even more extreme "verbal gymnastics" of creating new terminology, which he does. *Artuz*, *supra*. But what petitioner calls "**statutory** bar rules," Petition at 3 (emphasis in original), which allegedly include **both** petition-filing requirements and conditions to avoiding claims' default, simply do not exist in Pennsylvania law. There have likewise never been Pennsylvania "bar-overcoming rules," Petition at 4, "bar-trumping rules," *id*, "court-made anti-bar rules," Petition at 5 -- or any such synonym -- that allegedly act to overcome **both** application-

[20] These local defense-oriented articles were written by criminal defense attorneys who are associates and friends of petitioner's current counsel, as detailed in the courts below.

[21] This Court in *Artuz* sharply distinguished between these categories, stating that the basis for distinguishing state rules necessary for "proper filing" from those that are not is whether the rule is a condition to filing (an entire petition) or a condition to obtaining relief (upon individual claims asserted within a petition). Pennsylvania has both, and they are plainly differentiated.

The PCRA's provision labeled "Time for filing petition," 42 Pa.C.S. § 9545(b), reproduced above, resides in the section of the PCRA governing jurisdiction. The state's courts have consistently held that its judges lack jurisdiction to review a post-conviction petition unless the filing deadline has been met. *See, e.g., Commonwealth v. Howard*, 788 A.2d 351, 353 (Pa. 2002); *Commonwealth v. Crawley*, 739 A.2d 108 (Pa. 1999); *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 1999); *Commonwealth v. Yarris*, 731 A.2d 581, 586 (Pa. 1999); *Commonwealth v. Banks*, 726 A.2d 374, 375-76 (Pa. 1999); *Commonwealth v. Cross*, 726 A.2d 333, 334-36 (Pa. 1999); *Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998); *Commonwealth v. Conway*, 706 A.2d 1243 (Pa. Super. 1997); *Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa. Super. 1997). Under *Artuz*, compliance with § 9545(b) is a condition to **proper filing** under 28 U.S.C. § 2244(d)(2).

In contrast, the PCRA contains a separate provision explicitly labeled "Eligibility for relief." This section lists substantive claims, such as ineffective assistance or newly-discovered evidence, on which post-conviction relief is available. *See* 42 Pa.C.S. § 9543. The provision also contains requirements for relief that are not dependent on the nature of the claim raised: e.g., that the claim has not been previously litigated or waived. *See* 42 Pa.C.S. § 9543(a)(3). These claim-relief requirements are like those at issue in *Artuz*.

filing deadlines and the default of **claims** in them. These overbroad categories are fictional and were created exclusively by defense attorneys to combat AEDPA's time-bar.

Although there are state means of overcoming the default of claims in a PCRA petition, there are no extra-statutory exceptions to the time limit for filing a petition. It was never reasonable to presume, without qualification, that exceptions from one category would apply to the other. *Artuz*. The cases petitioner cites, Petition at 3-4, n.2-4, concern doctrines involving overcoming the default of claims, not the untimely or otherwise improper filing of petitions.[22] Since there was no PCRA time-bar before 1995, and since these pre-existing doctrines only operated to excuse the default of claims, it is false that "Pennsylvania prisoners reasonably expected they would trump the PCRA time-bar," Petition at 4. Any such expectation was manifestly unreasonable and a long-shot gamble, as petitioner's language aptly indicates. A reasonable prisoner would not have bet on such long odds, but would instead have played it safe, filing a timely federal habeas petition under the assumption that both the state PCRA and federal habeas time-bars were valid as written.

Pace's argument that it was reasonable of him to bet the petition-filing deadline would be "trumped" by claim-relief default doctrines is undermined by the fact that on its face, **before** any published opinions existed, the clear PCRA deadline statute **itself** took into account several of what he calls the "anti-bar" exceptions -- and set separate **petition-filing** deadlines for them. *See* discussion above. It was unreasonable to believe these excuses could be used to "trump" the specific PCRA time-bar deadline set in that

[22] However, his characterization of *Commonwealth v. Conway*, 706 A.2d 1243 (Pa. Super. 1997), as being in this category is inaccurate, as discussed below. Petition at 3 n.3.

statute for filing PCRA petitions containing such "anti-bar" claims.

The cases petitioner cites to support the notion that there was uncertainty in state law when he filed his time-barred PCRA petition in 1996 were issued **after** he filed that petition and do not stand for what he claims they do. These cases show no uncertainty in the law when petitioner filed his second and untimely state post-conviction petition in 1996. Nor do they demonstrate inconsistent or confusing application of it. Indeed, petitioner has not identified a single state **appellate** case where the time-bar was not applied. There were no such cases. The state cases he does cite, Petition at 7 n.10, stand for the proposition that if, as here, a **trial** court fails to realize the time-bar applies -- in almost every case he cites, the issue of timeliness was never even **raised** in the lower court -- then the Pennsylvania appellate courts will correct the mistake.

Thus, petitioner is hardly in a position to claim that state law compelled his delay in filing, or that the law created an impediment beyond his power to circumvent. Indeed, state law was full of alarm bells counseling prompt filing; all petitioner had to do was heed them. Petitioner argues that his "*pro se* status, indigence, and imprisonment also support equitable tolling." Petition at 32. That is incorrect. "[H]abeas relief, by definition, is almost always sought by an incarcerated petitioner, and we decline to find that this circumstance is so extraordinary as to warrant the application of this rarely-applied doctrine." *Johnson v. McCaughtry*, 265 F.3d 559, 566 (7th Cir. 2001).

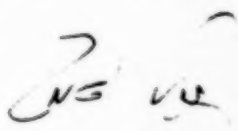
Petitioner also argues that his life sentence is relevant. Petition at 32. It is not. A life sentence for murder is routine. *See Rotella v. Wood*, *supra*, 528 U.S. at 561 ("The virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule."). Further, as the Fourth Circuit has recently expounded at length, the

gravity of a prisoner's sentence is not relevant to equitable tolling. *Rouse v. Lee*, 339 F.3d 238, 251-257 (4th Cir. 2003) (en banc), *cert. denied*, ___ U.S. ___, 124 S.Ct. 1605 (2004). Petitioner's argument, in fact, shows the danger of basing equitable tolling solely on the gravity of a prisoner's sentence, as the Third Circuit did in *Fahy*.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,



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ORIGINAL

Supreme Court, U.S.
FILED
SEP 15 2004
OFFICE OF THE CLERK

No. 03-9627

IN THE SUPREME COURT OF THE UNITED STATES

JOHN A. PACE,

Petitioner,

v.

DONALD VAUGHN, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Dated: September 15, 2004

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SUPREME COURT, U.S.

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Petitioner, John Pace, respectfully asks that the Court issue its writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit regarding statutory and equitable tolling of the AEDPA statute of limitations.[1] Petitioner files this short reply to the Commonwealth's Brief in Opposition.

ARGUMENT

I. THE COMMONWEALTH IS WRONG ON STATUTORY TOLLING.

The Commonwealth does not contest Petitioner's showing that the question reserved in Artuz v. Bennett, 531 U.S. 4, 8 n.2 (2000) – "whether the existence of certain exceptions to a [state court] timely filing requirement can prevent a late [state court] application from being considered improperly filed" – has created a Circuit split. See Petition for Writ of Certiorari § I. Instead, the Commonwealth claims that Carey v. Saffold, 536 U.S. 214 (2002) answered Artuz's reserved question about the meaning of "properly filed."

The Commonwealth's claim that Saffold decided the "properly filed" issue reserved by Artuz is wrong for the reasons stated the Petition for Writ of Certiorari – e.g., the words "properly filed" do not appear in the Saffold Court's opinion; the Saffold Court's opinion does not cite Artuz; and the Saffold briefs explicitly note that the meaning of "properly filed" was not before this Court.

After Saffold, as before, there is a split between the Courts of Appeal on the question reserved by Artuz. In the Third, Sixth and Seventh Circuits, a state post-conviction petition ruled "untimely" by the state courts is never "properly filed" for federal purposes. See Petition for Writ of Certiorari §§ I.B, II.A (discussing Third and Seventh Circuit cases); Brief in Opposition at 12 n.11 (citing Sixth Circuit decisions). In the Second, Fifth, Ninth and Eleventh Circuits, an state post-conviction ruled "untimely" by the state courts can be deemed "properly filed" for federal purposes. See Petition for Writ of Certiorari §§ I.A, II.B (discussing Second, Fifth, Ninth and Eleventh Circuit cases).[2]

The Commonwealth, citing Grillette v. Warden, 372 F.3d 765 (5th Cir. 2004), suggests that Saffold has caused the Fifth Circuit to reevaluate its "properly filed" precedent. Brief in Opposition at 14 & n.14. The Commonwealth's claim is remarkably wrong. In Grillette, the Fifth Circuit applied Saffold to the issue that Saffold actually decided – whether a state post-conviction application was "pending" during a gap between upper and lower state court proceedings. As to "properly filed," Grillette explicitly reaffirmed the Fifth Circuit's rule (described in the Petition for Writ of Certiorari) that untimely state post-conviction applications may nevertheless be "properly filed":

> [T]he State argues that because Grillette's June 8, 2000, application for supervisory writs was filed after the 30-day deadline imposed by Rule 4-3, the application was not "properly filed" ... under § 2244(d)(2). This argument, however, is foreclosed by our [prior] decision[s] ..., in which we held that **an application that is untimely under Louisiana Courts of Appeal Rule 4-3 is nevertheless "properly filed"** because Rule 4-3's deadline is not without exceptions .... The only question for our consideration on appeal, therefore, is whether Grillette's state habeas application remained "pending" under § 2244(d)(2) and therefore tolled the limitations period during the interval between the trial court's denial of Grillette's state habeas application and his filing, nearly thirteen months later, of his supervisory writ application to the Louisiana Court of Appeal.

Grillette, 372 F.3d at 770 n.5.[3] After Saffold, as before, the Fifth Circuit rule is that "untimely" state post-conviction applications may be "properly filed."

---

[1] All emphasis herein is supplied unless otherwise indicated. Respondents are referred to as "the Commonwealth."

[2] The Commonwealth, citing Rouse v. Lee, 339 F.3d 238 (4th Cir. 2003) (en banc), suggests that the Fourth Circuit is in the same "properly filed" camp as the Third, Sixth and Seventh Circuits. See Brief in Opposition at 12-13 & n.12. Actually, Rouse did not address the "properly filed" issue – it found "there is no question that Rouse's [state post-conviction application] was 'properly filed'"; and held that the state post-conviction application ceased to be "pending" when the state's highest court denied relief, state court rules did not allow an application for rehearing, and Rouse did not actually seek rehearing. Id., 339 F.3d at 244-45. To the best knowledge of undersigned counsel, the Fourth Circuit has not decided the "properly filed" issue presented herein.

[3] The Commonwealth also cites Dixon v. Cain, 316 F.3d 553 (5th Cir. 2003), see Brief in Opposition at 14 n.14, which did not address "properly filed" and, instead, considered only whether a state post-conviction application was "pending" during a gap in the state court proceedings.

The Commonwealth suggests that the Eleventh Circuit precedent cited by Petitioner, Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003) (untimely state post-conviction application was "properly filed"), is "at best unclear." Brief in Opposition at 13. But there is noting "unclear" about Siebert's ultimate conclusion – Siebert holds that an untimely state post-conviction application is "properly filed." To the extent that Siebert's discussion is "unclear," it confirms the need for this Court's review and clarification of these questions.

The Commonwealth also claims that a recent Eleventh Circuit decision, Wade v. Battle, — F.3d —, 2004 WL 1764054 (11th Cir. Aug. 6, 2004), "suggests a lack of confidence" in Siebert. Brief in Opposition at ~~13 &~~ n.13. There is no basis in Wade for the Commonwealth's assertion – Wade recognizes Siebert as controlling authority in the Eleventh Circuit.

Even the cases cited by the Commonwealth recognize that the Circuits are split on the "properly filed" issue, and that the Third/Sixth/Seventh Circuit approach creates "unfair" and "draconian" results. Keenen v. Bagley, 262 F.Supp.2d 818, 822-23, 826 (N.D. Ohio 2002) (cited in Brief in Opposition at 12 n.11).

This Court should grant the writ and decide this important issue for all the reasons stated herein and in the Petition for Writ of Certiorari.

II. THE COMMONWEALTH IS WRONG ON EQUITABLE TOLLING.

As discussed in the Petition for Writ of Certiorari § IV, the Third Circuit's narrow view of "properly filed," which requires the denial of statutory tolling whenever the state court deems the state proceedings untimely, is especially unfair because it is combined with a harsh approach to equitable tolling, which denies equitable tolling in cases, like this, where the petitioner acted "appropriately," "diligently," and "reasonably" in seeking state court remedies at a time when they appeared to be available, and when seeking such state court remedies was required by Third Circuit precedent regarding exhaustion of state remedies.

The Commonwealth tries to recast the equitable tolling issue as being about "ignorance of

the law," and cites cases holding that mere "legal mistakes" do not justify equitable tolling. Brief in Opposition at 15-20. The Commonwealth's argument and cases, however, are inapposite. This is not a case where the petitioner just made a "mistake" out of "ignorance of the law." Instead, this is a case where the petitioner did what Third Circuit exhaustion law at the time required him to do – he pursued state court remedies that the Third Circuit had held appeared to be available and that would-be habeas petitioners must exhaust before seeking federal review.

The Commonwealth also says Petitioner should not be afforded equitable tolling because his PCRA proceedings (where he sought to exhaust state remedies) supposedly did not raise any new claims that had not already been exhausted in his prior PCHA proceedings (where he litigated his first state post-conviction petition). See Brief in Opposition at 4-5, 15-16.

The Commonwealth's claim is frivolous. The District Court carefully reviewed the record in this case and determined that the PCRA proceedings raised claims that were not presented in the prior PCHA proceedings. The District Court is right. Petitioner's PCRA proceedings clearly raised at least one entirely new federal constitutional claim that was not raised in his PCHA proceedings – the claim that a sentence of life imprisonment without parole is illegal and violates due process and the Eighth Amendment when imposed for a crime other than first-degree murder or second-degree arson-murder.[4]

---

[4] See, e.g., A83 (PCRA Superior Court opinion describing one of the PCRA claims as being that "the imposition of a life sentence without eligibility for parole was illegal"); A73, PCHA Superior Court opinion (describing issues presented, which do not include this illegal sentence issue); SA61-62, *Petitioner's Objections to Magistrate Judge's Report and Recommendation* at 12-13 (describing different claims raised in PCHA and PCRA proceedings; illegal sentence claim not raised in PCHA proceedings). In its Third Circuit brief, the Commonwealth admitted that the "PCRA proceedings "added a new claim challenging the legality of a life sentence without parole," but asserted that this claim was actually "adjudicated" in the prior PCHA proceedings. Pace v. Vaughn, No. 02-3049, Brief for Appellants at 61 n.19 (3d Cir. Sep. 30, 2002) (citing PCHA Superior Court opinion, A71-76). The Commonwealth is wrong. Nothing in the PCHA Superior Court's opinion suggests that it adjudicated this claim, which was not raised in the PCHA proceedings. The part of the PCHA Superior Court opinion cited by the Commonwealth simply says that "life imprisonment" in Pennsylvania means life without parole – the opinion does not address the question of whether this fact about life imprisonment renders such a sentence illegal under certain

Moreover, even if the PCRA proceedings had not raised an entirely new claim, it was appropriate for Petitioner to seek PCRA relief for another reason – to exhaust additional facts in support of his other claims, as required by Third Circuit law. See Lesko v. Owens, 881 F.2d 44, 50 (3d Cir. 1989) ("Both the legal theory and the facts supporting a federal claim must have been submitted to the state courts."). Petitioner's PCRA proceedings asserted, inter alia, that his court-appointed PCHA counsel had been ineffective for failing to subpoena and call his guilty-plea counsel at the PCHA hearing. In Pennsylvania, there is "an enforceable right to effective post-conviction counsel," Commonwealth v. Albrecht, 720 A.2d 693, 700 (Pa. 1998), "at both the hearing and appellate levels" and, when post-conviction counsel's "representation is deemed to be inadequate, it is inappropriate to allow the proceedings in which it was rendered to be binding upon the defendant's rights," Commonwealth v. Albert, 561 A.2d 736, 738 (Pa. 1989). Thus, if the state courts had not deemed Petitioner's PCRA claim untimely, an appropriate remedy for PCHA counsel's ineffectiveness would have been to allow Petitioner a hearing at which he could present the evidence that effective PCHA counsel would have presented, including the testimony of trial counsel who misled Petitioner as to the actual result of a guilty plea. The Commonwealth would penalize Petitioner for trying to exhaust all the facts, as required by the exhaustion requirement.

Federal judges have recognized the unfairness of the Third Circuit's equitable tolling law. For example, in Schlueter v. Varner, — F.3d —, 2004 WL 2035180, *8, *10-*11 (3d Cir. Sept. 14, 2004), Third Circuit Judge Ambro dissented from the denial of equitable tolling, described the majority's denial of tolling as "**unfair**" and causing "**fundamental inequity**," and noted that "**[o]ther courts [of appeal] have applied equitable tolling** under circumstances" where the Third circuit denies it. Similarly, in McKeithen v. Varner, No. 02-1913, 2004 WL 1920957 (3d Cir. Aug. 30, 2004) (unpublished, text on Westlaw), Senior District Judge Oberdorfer, United States District Court for the District of Columbia, sitting by designation on a Third Circuit panel, "has written a

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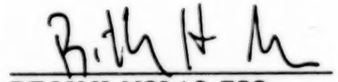
circumstances, which was the claim Petitioner raised for the first time in the PCRA proceedings.

powerful dissent," id. at *3 n.3 (majority), criticizing the Third Circuit's "**unfair** and **legally unnecessary**" approach to equitable tolling, id., at *4 (dissent). This Court should grant the writ and review the Third Circuit's decision.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and above this Court should grant the writ and review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



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Dated: September 15, 2004

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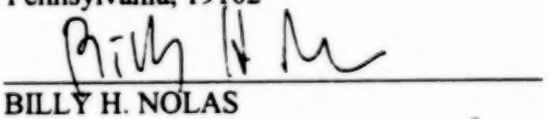

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(5)

Supreme Court, U
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In The Supreme Court of the United States

JOHN A. PACE,

Petitioner,

v.

DAVID DiGUGLIELMO, Superintendent,
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Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX
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COURT OF COMMON PLEAS
TRIAL DIVISION
APPEALS UNIT

11-6-85		Courtroom 602 Presiding Honorable David Savitt Defense counsel ill. Cont. November 13, 1985, rm. 602, 12:00 Noon for arraignment. By the Court, Savitt, J.
11-13-85		Courtroom 602 Presiding Honorable David Savitt Deft. formally arrainmed. Continued for status, 12-16-85, rm. 602, 9:00 A.M. By the Court, Savitt, J.
-------	D-1	Motion to Suppress Evidence and Identification, filed.
12-16-85		Courtroom 602 Presiding Honorable David Savitt Possible waiver trial. Motion to be heard at time of trial. Place in ready pool. By the Court, Savitt, J.
12-13-86	D-2	Motion to Transfer from Common Pleas Court, Trial Division, Criminal Section to Common Pleas Court, Family Division, Juvenile. Section, filed.

12-13-86 Courtroom 602
Presiding Honorable David Savitt Counsel,
Moira Dunworth, Esq.
Steno – Marge Canterino

Defense motion to de-certify defendant and transfer matter to Juvenile Court for disposition is argued and denied. By the Court,

Savitt, J.

Defendant Pleads:

1272 – Guilty to 1st count – M-1.

1275 – Guilty to Murder, 2nd Degree.

AND NOW SENTENCE:

1272 – Not less than one (1) year, nor more than two (2) years in the State Correction to be served concurrently with sentence on 8510-1275. By the Court,
Savitt, J.

1275 – The defendant is sentenced to serve Life Imprisonment in State Correctional Institution. Recommended that sentence be served in Camp Hill, S.C.I. or a suitable facility due to defendant's age. By the Court,

Savitt, J.

8-21-86 D-3 Petition under Post Conviction Hearing Act, filed.

2-23-87 D-4 Motion for Leave of Court to Have Defense Counsel replaced by New Counsel, filed, pro se.

3-11-87 D-5 Amended Petition under Post Conviction Hearing Act, filed.

3-23-87 Courtroom 788
Presiding Honorable Joseph O'Keefe

C-3-24-87 – Status. By the Court,

O'Keefe,

3-24-87 Courtroom 788
Presiding Honorable Joseph O'Keefe

C-3-25-87 for status. Attorney not present. By the Court,

O'Keefe, J.

3-25-87 Courtroom 788
Presiding Honorable Joseph O'Keefe

C-3-27-87 – status. Attorney on trial elsewhere and unavailable. By the Court,

O'Keefe, J.

3-27-87 Courtroom 788
Presiding Honorable Joseph O'Keefe

C-3-31-87 for status. Attorney F. Green ill. By the Court,

O'Keefe, J.

3-31-87 Courtroom 788
Presiding Honorable Joseph O'Keefe,

Amended Petition filed. C-6-3-87 – C/W answer and status. By the Court,

O'Keefe, J.

6-3-87 Courtroom 788
Presiding Honorable Joseph O'Keefe

C-8-14-87 for C/W answer and status. By the Court, O'Keefe, J.

-------	D-6	Commonwealth's Motion to Dismiss or Compel Specific Pleading of Defendant's P.C.H.A. Petition, filed.
9-3-87		Courtroom 788 Presiding Honorable Joseph O'Keefe C/W answer filed. "Specs" order signed. C-1-4-88 for Motion to Dismiss. By the Court, O'Keefe, J.
1-3-88	D-7	Answer to Commonwealth's Motion to Dismiss, filed.
1-4-88		Courtroom 788 Presiding Honorable Joseph O'Keefe Defense request. C-1-11-88 – Motion to Dismiss. By the Court, O'Keefe, J.
1-11-88		Courtroom 788 Presiding Honorable Joseph O'Keefe Motion to Dismsis, After argument, Decision, H.U.A. By the Court, O'Keefe, J.
1-29-88	D-8	Letter-Brief filed by Commonwealth.
7-25-88	D-9	ORDER: It is hereby ORDERED AND DECREED that the Commonwealth's Motion to Dismiss the Defendant's Petition for Relief under the Post Conviction Hearing Act is DENIED. It is further ORDERED AND DECREED that an evidentiary hearing be conducted on November 15, 1988 to address the claims raised in the Defendant's Amended Petition for Relief. By the Court, O'Keefe, J.

2-9-89		Courtroom 788 Judge ill. C-6-16-89 for hearing.
6-16-89		Courtroom 788 Presiding Honorable James McCrudden Franklin Green, Esq., permitted to withdraw. New Counsel to be appointed. C.F.N. By the Court, McCrudden, J.
7-28-89	D-10	ORDER: The Court orders the appointment of David Rudenstein, Esq., as counsel, to represent the defendant in the Above captioned homicide matter. This appointment is not transferable; is effective immediately; is inclusive of all appeals as well as any new trials. By the Court, [Illegible], J.
10-27-89		Courtroom 788 Presiding Honorable James McCrudden C-11-29-89 – Possible Motion to Dismiss. By the Court, McCrudden, J.
-------	D-11	Amended P.C.R.A. Petition, filed.
11-29-89		Courtroom 315 Presiding Honorable James McCrudden Amended Petition filed. C-1-30-90 – Commonwealth answer and status. By the Court, McCrudden, J.

1-30-90		Courtroom 788 Presiding Honorable James McCrudden C/W answer to be filed. Def. atty. on trial. C-4-18-90 for motion to dismiss. By the Court, McCrudden, J.
3-29-90	D-12	Commonwealth's Motion to Dismiss, filed.
4-18-90		Courtroom 788 Presiding Honorable James McCrudden Motion to Dismiss argument heard. Decision, H.U.A. By the Court, McCrudden, J.
11-29-90		Courtroom 633 Presiding Honorable Francis Biunno C-2-8-91 rm. 788. Comm. Motion to Dismiss held under abeyance pending hearing. Deft. to be brought down. By the Court, Biunno, J.
2-8-91		Courtroom 788 C-3-26-91 for hearing. Atty. present. No Judge.
3-26-91		Courtroom 788 Presiding Honorable James McCrudden Evidentiary hearing. Held under Advisement. By the Court, McCrudden, J.
7-23-91	D-13	Order of Judge McCrudden entered wherein the defendant's Petition for Post Conviction Relief is denied.

8-1-91	D-14	Notice of Appeal to Superior Court filed by: David Rudenstein, Esq. Status: IFP/XXXXXXXXXXX._____ Order of Judge McCrudden entered wherein PCHA counsel is relieved and new counsel is to be appointed. New Counsel appointed: _____
8-22-91	D-15	OPINION, FILED. McCRUDDEN, J.
	D-16	NOTES OF TESTIMONY: 10-10-85, 2-13-86, 1-11-38, 3-26-91
8-23-91		Record transmitted to Appellate Court.
11-27-96	D-18	Pro Se Petition Under The Post Conviction Relief Act, Filed.
11-27-96	D-19	Pro Se Memorandum Of Law In Support Of Defendant's Motion Under Post conviction Relief Act, Filed.
4-8-97		Continued to 6-17-97, Rm. 607 for Amended Petition or Finley Letter (or counsel to be removed). Savitt, J.
6-13-97	D-20	Finley Letter, Filed.
6-17-94		Finley Letter field with PCRA Unit. Continued 7-23-97, Rm. 607, for DISMISSAL. Savitt, J.
7-3-97	D-21	Pro Se Response To Finley Letter, Filed.
7-23-97		Defendant's Objections DISMISSED. PCRA Petition DISMISSED. Savitt. J.
7-24-97	D-22	Order of Judge SAVITT entered wherein the defendant's Petition for Post Conviction Relief Act is dismissed and no new counsel is to be appointed.

7-29-97 D-23 Record returned from Judge SAVITT
Opinion Filed.

8-21-97 D-24 Notice of Appeal to SUPERIOR Court filed
by: JOHN PACE
Status: XXXX/Pro se/XXXX _____

_____

_____

_____

New Counsel Appointed: _____

_____

_____

2-19-98 ------ Record transmitted to Appellate Court.

D-25 NOTES OF TESTIMONY:

10-9-85, 2-13-86, 1-11-88, 3-26-91, 4-8-97, 6-17-97, 7-23-97

APPELLATE COURT ACTION

Date: Opinion by: PER CURIAM

– Judgment of sentence affirmed by Superior Court.

12-3-98 – Order DENYING PCRA affirmed by Superior Court.

– Judgment of sentence/order _____ reversed/vacated

– Miscellaneous Disposition:

3-8-99 – Petition for Allowance of Appeal to the Supreme Court, filed 120 EAL1999.

7-29-99 – Petition for Allocatur Denied.

– Petition for Allocatur Granted.
Appeal Docket # _____

– Record sent to Supreme Court _____.

– Decision of the Supreme Court:

9-10-99 – Record returned to the Jurisdiction of the Court of Common Pleas Phila (9-14-99).
Defendant in Graterford at # AY6445

– Disposition Code 042/030 Letter Code B

9-16-99 – Record to: Microfilm: ✓
Other: _____

IN THE MUNICIPAL COURT OF PHILADELPHIA

ROOM 675 – CITY HALL

- - -

COMMONWEALTH	: CHARGES:
	: MURDER 2502,
VS.	: ROBBERY 3701,
	: POSSESSION OF AN
	: INSTRUMENT OF CRIME 907
JOHN PACE	: MC 85-09-3144

- - - -

Philadelphia, Pennsylvania

October 9, 1985

- - -

BEFORE: THE HONORABLE MITCHELL S. LIPSCHUT, JUDGE

- - -

APPEARANCES:

MICHAEL McGOVERN, ESQUIRE
Assistant District Attorney
For the Commonwealth

MOIRA DUNWORTH, ESQUIRE
Counsel for the Defendant

- - -

REPORTED BY:

SALVATORE NATALE,
OFFICIAL COURT REPORTER

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(Badge Number 798)		

[3] MR. McGOVERN: Your Honor, it is my understanding for the purposes of the preliminary hearing, only, that there is a stipulation by and between counsel, that as to the following: That the decedent in this case is one Randolph Baldwin. That he was a life in being on September 28, 1985. That the date of the assault in question was September 18, 1985 and on September 28, 1985 Mr. Baldwin, who is a fifty-six year old negro male was pronounced dead the Presbyterian Hospital by Dr. Bethala. That a post-mortem examination was performed by Dr. Segal of the Medical Examiner's Office, of Philadelphia, and that Dr. Segal determined that the cause of death was cranio-cerebral injury. That is the stipulation for the purposes of the preliminary hearing only.

THE COURT: I take it from what I understand, there is going to be a statement. I take it there is a copy for the Court?

[4] MR. McGOVERN: I have a copy for the Court and there is a copy which I am going to be asking be marked C-1. which is the same copy as I asked that be provided to the Court Reporter, at the conclusion of the proceedings.

THE COURT: Any reason the Court can't read this item to itself and subsequently have it attached to the record and then make any argument, if counsel has any cross-examination, rather than going through the procedure of having it pains takingly into the record.

MS. DUNWORTH: No, Your Honor, not in terms of the contents of the statement. I would request the Court to have an opportunity to cross-examine.

THE COURT: Oh yes.

I take it the testimony would be that the officer – he received such responses that enabled him to take the statement. That would his testimony not that those are the facts, that he would testify to.

[5] MS. DUNWORTH: Yes, Your Honor.

THE COURT: Very well.

MR. McGOVERN: To be clear, the testimony of Detective Rocks, the warnings were provided to the defendant who is seventeen years old, and his mother, Dorothy Clements.

THE COURT: Very well.

The Court will read the statement.

(Whereupon there was a brief pause.)

THE COURT: Very well.

MR. McGOVERN: Could I call Detective Rocks to the stand?

THE COURT: You may.

COMMONWEALTH'S EVIDENCE

DETECTIVE EDWARD ROCKS (Badge Number 798, Homicide Division), having been duly sworn, was examined and testified as follows:

MR. McGOVERN: May I proceed?

THE COURT: Yes.

I take it there is a stipulation for the purposes of this hearing, that [6] C-1 is in fact the statement allegedly taken from this defendant regarding this matter?

MR. DUNWORTH: I would stipulate to that.

THE COURT: Very well.

MR. McGOVERN: For the record, also, an exact duplicate copy of the statement was provided to defense prior to the proceeding.

THE COURT: Yes.

MR. McGOVERN: There is one other thing I'd like to indicate, Your Honor.

This is a statement taken by Detective Edward Rocks. There is an additional, also a statement taken of the defendant by Detective Gerald Davis of West Detectives, that is not subject of this hearing.

THE COURT: Very well.

DIRECT EXAMINATION

BY MR. McGOVERN:

Q. Detective Rocks, you're assigned to the [7] Homicide Division of the Philadelphia Police Department, is that correct?

A. Yes, that's correct.

Q. Were you so assigned on September 30, 1985?

A. That's correct.

Q. And on Monday, September 30, 1985, did you have an occasion to come in contact with any individual that you see in the courtroom?

A. Yes, I did.

Q. Would you – did you come in contact with the defendant in this matter, John Pace?

A. Yes.

Q. Could you point to that person?

A. (No response).

THE COURT: Can we agree that the defendant is sitting with counsel?

MS. DUNWORTH Yes.

THE COURT: The defendant is in the courtroom.

BY MR. MCGOVERN:

Q. Where and when did you first come in contact with the defendant on September 30, 1985?

[8] A. At 1801 Vine Street in the sheriff's cell area in the basement.

Q. Did you have an occasion to interview the defendant on that day?

A. Yes, I did.

Q. And what time did you interview the defendant?

A. 1630 hours inside Homicide Division.

Q. And prior to interviewing the defendant, did you advise him of his Miranda warnings, his legal rights?

A. Yes, I did.

Q. Was the defendant accompanied by anyone at the time that you advised him of his rights?

A. Yes, his mother Dorothy CLements.

Q. Was she present with the defendant throughout the course of the interview with him?

A. Yes, she was.

Q. Did you advise both the defendant – did you advise the defendant of his legal rights in the presence of his mother?

A. Yes.

Q. Did you subsequently question the [9] defendant with regard to the seven questions, standard questions, indicating a voluntariness or lack of voluntariness to give a statement. . . .

THE COURT: That was stipulated to.

MS. DUNWORTH: That was stipulated to.

MR. McGOVERN: I will strike that with the Court's permission. May I withdraw that?

THE COURT: Stipulated all of that would be his testimony.

BY MR. McGOVERN:

Q. And these questions you asked the defendant, were in the presence of his mother?

A. Yes.

Q. And did the defendant and his mother indicate on the statement that you took from them, initialed as to each and every answer that were provided to you?

A. Yes, they each initialed each question and each signed the bottom of the page.

Q. The statement you took from the defendant, in the presence of his mother, how long was the body of the statement? That is the actual [10] question and answer portion?

A. (No response).

THE COURT: It speaks for itself. It is marked C-1 and attached by agreement.

BY MR. McGOVERN:

Q. What time did you conclude the interview with the defendant and his mother?

A. 1750 hours, 5:50.

MR. McGOVERN: I have nothing further at this time.

(At this time the following statement was incorporated into the transcript.)

QUESTION: John, I have showed you and your mother, Dorothy Clements, the copy of arrest warrant #140358 and you have been given your warnings. Can you tell me in your own words, about the robbery and beating of Randolph Baldwin, N/M/56 on 9-18-85 at 0435 hours on the highway at 18 N. 53rd STreet?

ANSWER: On that night, I left my house at eleven something and I went down 56th and Arch STreet and I went to my [11] friend's house. His name is Roger Lovett. I left there around three-thirty to walk home. I walked up Market STreet, and I turned up 53rd Street towards Arch Street. I saw the man walking towards Market Street on the the same side of the street as me. We were facing each other and we passed each other. When he passed me he stopped and looked at me. I asked him what was he looking at. He told me to get out of here that he knew what I was up to. I had a blackjack in my right back pocket and he swung at me. We was grabbing each other and I pushed him to the side and I hit him with it. I just hit him once and the police came up. I was going to rob him but I didn't ake anything from him.

QUESTION: When you struck the man with the blackjack what position was his body in?

ANSWER: He was leaning over halfway on his side.

QUESTION: What part of the man's body did you strike with the blackjack?

ANSWER: I hit him on the side [12] of the head.

QUESTION: What did the man do when you hit him in the head with the blackjack?

ANSWER: He fell backwards and I started walking and that's when the cops came.

QUESTION: Can you describe the blackjack?

ANSWER: It was black leather flat slapjack. (Pace was shown a slapjack by Det. Rocks and he stated that it was the same type but his was bigger.)

QUESTION: John, where did you get the slapjack?

ANSWER: I got it that night from Roger Lovette because I had to walk home at four-o'clock in the morning.

QUESTION: Why did the man swing at you?

ANSWER: Because he thought I was going to rob him.

QUESTION: Can you describe the man that you struck with the slapjack?

[13] ANSWER: He was about my size and he had a hat on and he was wearing a tan coat and brown pants on.

QUESTION: How much money did you have in your possession when you were walking home when this incident occurred?

ANSWER: I didn't have any money.

QUESTION: John, do you remember having a conversation with Sergeant McDonnell on 9-18-85 at about 0500 hours inside the 18th District at 5500 Pine Street?

ANSWER: Yes.

QUESTION: Do you remember what you told the sergeant?

ANSWER: I asked how the man was doing and I said I was sorry. I said that I didn't want to hit him I just wanted some money.

QUESTION: Why did you hit the man with the blackjack?

ANSWER: Because I thought he was going to hit me.

QUESTION: Did the man have anything in his hands or any kind of [14] weapon?

ANSWER: He only had a little brown paper bag in his hand.

QUESTION: When did you first see the police?

ANSWER: When I started walking away.

QUESTION: John, after you struck the man with the slapjack what did you do with the slapjack?

ANSWER: I saw the police car coming and I threw it inside a yard.

QUESTION: Did you strike the man with your fists before you hit him with the slapjack?

ANSWER: No. I grabbed him by his jacket and I threw him on the ground and when he was getting up that's when I hit him with the jack.

QUESTION: Where does Roger Lovette live?

ANSWER: He lives at 111 N. Arch Street – okay let me tell you the truth – I got the blackjack earlier in the [15] week and I went into somebody's car and took it. The Sunday before there was a small car around the corner with the window down. I went into the car and the blackjack was on the floor in the back. That's all I took because there was nothing else in there.

QUESTION: Can you, write and understand the English language?

ANSWER: Yes.

QUESTION: Are you presently under the influence of alcohol or narcotic drugs?

ANSWER: No.

QUESTION: What was the last grade you completed in school?

ANSWER: Ninth grade.

QUESTION: Are you making this statement of your own free will in the presence of your mother, Dorothy Clements?

ANSWER: Yeah.

QUESTION: Why are you making this atatement?

[16] ANSWER: I want to get everything right and it is the truth.

MS. DUNWORTH: May I proceed?

THE COURT: You may.

CROSS-EXAMINATION

BY MS. DUNWORTH:

Q. Detective Rocks, do you know how old Mr. Pace is?

A. Did I know how old he is?

Q. Yes.

A. Yes, seventeen.

Q. Were you aware of his age at the time you took his statement?

A. I was.

Q. Can you tell the Court when he was apprehended?

A. He was charged with the murder warrant on the 30th.

Q. Had he been in custody prior to that time?

A. Yes, he had.

Q. How long had he been in custody prior to that?

A. Since the incident, the night of the incident.

[17] Q. When was that?

A. September 18th.

Q. He had been in custody from September 18th until the time he gave a statement, which was September 30th, is that correct?

A. To the best of my knowledge, yes.

Q. And I would take it that the statement was given subsequent to the death of Mr. Baldwin?

A. That's correct.

Q. When did Mr. Baldwin die?

A. I believe on the 28th.

Q. Two days prior to the time that my client was interviewed, is that correct?

A. That's correct.

Q. Do you recall, I don't know if this is self evident. I'd like to ask. What time did the statement begin?

A. The statement began 1630 hours.

Q. And it ended when?

A. 1750, which would be 5:50 p.m.

Q. And can you indicate to the Court how long after his mother arrived at the station that the statement was taken?

A. Approximately ten minutes.

[18] Q. And can you tell me how long prior to the time that Mrs. Clements arrived that Mr. Pace had been in your company?

A. In my company?

Q. Yes sir.

A. He was in the homicide for a little over an hour.

Q. Prior to the time his mother came?

A. Yes.

Q. Did you speak with my client during that hour before his mother came to the station?

A. No, I did not.

Q. Did anyone else, of the Police Department, speak with my client before his mother arrived?

A. Not that I know of.

Q. Now, the statement you took from my client, was it completed first to writing or was it placed immediately on the typewriter as my client gave it?

A. It was placed immediately on the typewri[illegible].

Q. And the copy, I see in front of me, Commonwealth Exhibit Number One, is that in fact a copy of the statement that you took directly and placed directly on the typewriter?

[19] A. Yes.

Q. Now, did you ever give Mrs. Clements a statement or read to her a statement of her rights separately from the time you gave Mr. Pace his rights?

A. (No response).

MR. McGOVERN: Objection.

THE COURT: Sustain the objection.

I don't know that she particular rights.

MS. DUNWORTH: I was just merely asking the question.

Now, if the Court would indulge me for a moment?

THE COURT: Yes.

(Whereupon there was a brief pause.)

BY MS. DUNWORTH:

Q. Was anybody else, sir, besides yourself, present during the entire time the statement was given by my client?

A. Just myself, your client and your client's mother.

MS. DUNWORTH: Very well.

Nothing further.

[20] MR. McGOVERN: I have no further questions, Your Honor.

(Witness excused.)

MR. McGOVERN: The Commonwealth rests its case at the preliminary hearing.

Moving for the introduction of C-1 into evidence. I move for the introduction of C-1 into evidence.

The Commonwealth's rests. That's our case.

THE COURT: C-1, I will mark this copy. Give it to the court reporter for the inclusion into the record.

MS. DUNWORTH: May I address the Court on a matter of bail?

THE COURT: Is there any meaningful argument, Miss Dunworth, for this matter?

MS. DUNWORTH: Not at this time, Your Honor.

THE COURT: The Court finds a prima facie case has been made out on all charges and the defendant is held for court and advised his pretrial arraign-[21]ment will be scheduled for October 23,1985 in Room 875 City Hall at noon.

Now, I would hear on the question of bail. First I will hear from the Commonwealth as to whether in accordance to the rules, Commonwealth has any aggravating circumstances within the law that wishes to place on the record to make this a capital case.

MR. McGOVERN: It's our contention it is a capital case and not bailable. It's our contention arguably and I submit prima facie cases I relatively first degree case and the aggravating circumstances we would argue that the murder was committed during the commmission of a felony, to wit, armed robbery. We request that the defendant continue to be held without bail.

MS. DUNWORTH: I submit the statement is not at all self evident. In terms having been robbery being committed or . . .

THE COURT: If you read the [22] language, the defendant's language in the statement, at one point, it's somewhat nebulous. At another point, he agrees and he did say, seems to confirm he had intended to rob the gentleman. Since that was his intention, committing the act, it seems to me, to certainly be enough to be a basis to sustain the Commonwealth's position on the matter.

MS. DUNWORTH: Your Honor, I don't wish to belabor this. I know it's a prima facie level. My client – I spoke to my client at length. He indicated somewhat different than what the statement indicated.

THE COURT: That may be. That's a matter of defense and although I have before me a statement introduced into evidence and based upon that, it seems to me I must sustain the Commonwealth's position.

Bail is denied.

- - -

TESTIMONY CONCLUDED

Statement of: John A. PACE N/M/17 res: 4936 Thompson St. Phila. Pa. 19139

Date: Monday, September 30, 1985

Concerning: Murder of Randolph BALDWIN N/M/56 res: 127 N. Connastoga St Phila. Pa. which occurred on 9-18-85 at #18 N. 53rd St at 0435 hours on the highway.

STATEMENT OF: John A. PACE N/M/17, residence 4936 Thompson St. Phila. Pa. 19139, phone #473-3896, DOB 4-28-68.

DATE AND TIME: Monday, September 30, 1985 1630 hours

PLACE: Police Administration Building, 8th & Race St, room #104, interview room "C", Homicide Division.

CONCERNING: The robbery and homicide committed on 9-18-85 at #18 N. 53rd St at 0435 hours. The complainant/decedant being Randolph BALDWIN N/M/56.

IN PRESENCE OF: John A. PACE
Dorothy CLEMENTS (Mother) N/F/52, same address

INTERROGATED BY: Det. Edward J. ROCKS #798 Homicide Division

RECORDED BY: Det. Edward J. ROCKS #798, Homicide Division

I am Det. Edward J. ROCKS #798 of the Homicide Division, Philadelphia Police Department

We are questioning you concerning the robbery and beating death of Randolph BALDWIN N/M/56 which occurred on 9-18-85 at 0435 hours on the highway at #18 N. 53rd St Phila. Pa.

We have a duty to explain to you and to warn you that you have the following legal rights:

A. You have a right to remain silent and do not have to say anything at all. [/s/ JP /s/ D.C]

B. Anything you say can and will be used against you in Court. [/s/ JP /s/ D.C]

C. You have a right to talk to a lawyer of your own choice before we ask you any questions, and also to have a lawyer here with you while we ask questions. [/s/ JP /s/ D.C]

D. If you cannot afford to hire a lawyer, and you want one, we will see that you have a lawyer provided to you, free of charge, before we ask you any questions. [/s/ JP /s/ D.C]

E. If you are willing to give us a statement, you have a right to stop any time you wish. [/s/ JP /s/ D.C]

1. Q. Do you understand that you have a right to keep quiet, and do not have to say anything at all?

A. **Yeah.** [/s/ JP /s/ D.C]

2. Q. Do you understand that anything you say can and will be used against you?

   A. **Yes.** [/s/ JP /s/ D.C]

3. Q. Do you want to remain silent?

   A. **No.** [/s/ JP /s/ D.C]

4. Q. Do you understand that you have a right to talk with a lawyer before we ask you any questions?

   A. **Yes.** [/s/ JP /s/ D.C]

5. Q. Do you understand that if you cannot afford to hire a lawyer, and you want one, we will not ask you any questions until a lawyer is appointed for you free of charge.

   A. **Yes.** [/s/ JP /s/ D.C]

6. Q. Do you want to talk with a lawyer at this time, or to have a lawyer with you while we ask you questions?

   A. **No.** [/s/ JP /s/ D.C]

7. Q. Are you willing to answer questions of your own free will, without force or fear, and without any threats or promises having been made to you?

   A. **Yes.** [/s/ JP /s/ D.C]

Q. John, I have showed you and your mother, Dorothy Clements the copy of arrest warrant #140358 and you have been given your warnings. Can you tell me in your own words about the robbery and beating of Randolph BALDWIN N/M/56 on 9-18-85 at 0435 hours on the highway at #18 N. 53rd St?

A. On that night I left my house at eleven something and I went down 56th and Arch St and I went to my friend's house. His name is Roger Lovette. I left there

around three thirty to walk home. I walked up Market St. and I turned up 53rd St towards Arch St. I saw the man walking towards Market St on the same side of the street as me. We were facing each other and we passed each other. When he passed me he stopped and looked at me. I asked him what was he looking at. He told me to get out of here that he knew what I was up to. I had the blackjack in my right back pocket and he swung at me. We was grabbing each other and I pushed him to the side and I hit him with it. I just hit him once and the police came up. I was going to rob him but I didn't take anything from him.

Q. When you struck the man with the blackjack what position was his body in?

A. He was leaning over halfway on his side.

Q. What part of the man's body did you strike with the blackjack?

A. I hit him on the side of the head.

Q. What did the man do when you hit him in the head with the blackjack?

A. He fell backwards and I started walking and that's when the cops came.

Q. Can you describe the blackjack?

A. It was black leather flat slapjack. (PACE was shown a slapjack by Det. ROCKS and he stated that it was the same type but his was bigger)

Q. John, where did you get the slapjack?

A. I got it that night from Roger LOVETTE because I had to walk home at four O'clock in the morning.

Q. Why did the man swing at you?

A. Because he thought I was going to rob him.

Q. Can you describe the man that you struck with the slapjack?

A. He was about my size and he had a hat on and he was wearing a tan coat and brown pants on.

Q. How much money did you have in your possession when you were walking home when this incident occurred?

A. I didn't have any money.

Q. John, do you remember having a conversation with Sergeant MCDONNELL on 9-18-85 at about 0500 hours inside the 18th district at 5500 Pine St?

A. Yes.

Q. Do you remember what you told the Sergeant?

A. I asked how the man was doing and I said I was sorry. I said that I didn't want to hit him I just wanted some money.

Q. Why did you hit the man with the blackjack?

A. Because I thought he was going to hit me.

Q. Did the man have anything in his hands or any kind of weapon?

A. He only had a little brown paper bag in his hand.

Q. When did you first see the police?

A. When I started walking away.

Q. John, after you struck the man with the slapjack what did you do with the slapjack?

A. I saw the police car coming and I threw it inside a yard.

Q. Did you strike the man with your fists before you hit him with the slapjack?

A. No. I grabbed him by his jacket and I threw him on the ground and when he was getting up that's when I hit him with the jack.

Q. Where does Roger LOVETTE live?

A. He lives at 111 N. Arch St – OK let me tell you the truth – I got the blackjack earlier in the week and I went into somebody's car and took it. The Sunday before there was a small car around the corner with the window down. I went into the car and the blackjack was on the floor in the back. That's all I took because there was nothing else in there.

Q. Can you read, write and understand the English language?

A. Yes.

Q. Are you presently under the influence of alchol or narcotic drugs?

A. No.

Q. What was the last grade you completed in school?

A. Ninth grade.

Q. Are you making this statement of your own free will in the presence of your mother, Dorothy CLEMENTS?

A. Yeah.

Q. Why are you making this statement?

A. I want to get everything right and it is the truth.

/s/ John Pace DATE: 9/30/85 TIME: 5:50 PM
/s/ Dorothy Clemmens DATE: 9/30/85 TIME: 5:50 PM

Statement of:

Det. Edward J. Rocks #798 1750 hours 9-30-85

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct transcript of the same.

/s/ Salvatore Natale
Official Stenographer

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
HOMICIDE DIVISION

- - -

COMMONWEALTH	:	OCTOBER TERM, 1985
vs.	:	
JOHN A. PACE	:	NOS. 1272-1275

- - -

February 13, 1986

- - -

Courtroom 602, City Hall
Philadelphia, Pennsylvania

- - -

BEFORE: HONORABLE DAVID N. SAVITT, J.

- - -

APPEARANCES:

CHARLES GALLAGHER, ESQUIRE
Assistant District Attorney
For the Commonwealth

MOIRA DUNWORTH, ESQUIRE
For the Defendant

- - -

[2] THE COURT: This is the case of Commonwealth versus John Pace.

I understand there is a motion to Decertify?

MS. DUNWORTH: Yes, Your Honor.

THE COURT: I haven't seen the motion.

MS. DUNWORTH: Sorry, sir.

THE COURT: Is this the original that is being filed?

MS. DUNWORTH: Yes, sir. They would not take it for filing in the normal course of events, which would be 685. They explained I would need the Court to sign the order but since that was two days ago that I tried to file it, yesterday was a holiday, that's why I brought it here.

THE COURT: Let the original motion be placed in the Quarter Sessions file.

Do you have a copy for the Court?

MS. DUNWORTH: Yes.

THE COURT: I presume you have a copy.

[3] MR. GALLAGHER: Yes, Your Honor, I got a copy this morning.

THE COURT: You may proceed.

MS. DUNWORTH: As the Court is well aware, Your Honor, the burden is upon the defendant to show his need to be amenable to a program of rehabilitation, supervision, care, could better take place within the juvenile system than in the criminal system, and that is really black letter law, citing Commonwealth versus Pyle, Your Honor, which is a 1975 case and still really the basis of the law today, Your Honor.

In that regard, it is our contention that the statute which governs the juvenile aid, which governs whether a juvenile should or should not be transferred to the criminal system is rather ambiguous, Your Honor, and places an

unduly heavy burden upon the defendant, but nonetheless, we will proceed and try to set forth sufficient reasons for the Court to consider the transfer, Your Honor.

THE COURT: You may present any facts that you deem relevant to secure this [4] position, and you can do some of them, I'm sure, by stipulation with counsel, and you may have some agreement as to the defendant's age and other things. Otherwise, any testimony you want to present will be heard.

MS. DUNWORTH: The stipulation I presume would be that my client was 17 at the time of his arrest in September of 1985, for originally, what was a robbery charge, and aggravated assault, and upon the death of Mr. Baldwin –

THE COURT: The defendant was 17 at the time of the offense?

MS. DUNWORTH: Yes, at the time of his arrest, which was September 18, 1985.

My client turned 17 in April, April 28th, to be specific, 1985.

Subsequent to my client's arrest for robbery and aggravated assault, Mr. Baldwin died while my client was in custody, and died on the 30th of September, so I believe we can certainly stipulate to those facts.

My client had completed the tenth [5] grade at West Philadelphia High at the time of his arrest. He was in the 11th grade.

Now admittedly, Your Honor, my client doesn't really have a terrific glowing record prior to the time of his

arrest and that's probably one of the reasons why he is here.

If he did have a terrific record, he probably wouldn't be here; however, I wish to point out that how my client has done in the limited time that he has been incarcerated is really what I think that the Court should be looking at as a determinant as to whether or not he is amenable to rehabilitation in the juvenile system.

As I indicated, he was arrested in September, '85. He has since that time attended the Youth Study Center school, which is right on the premises of the Youth Study Center itself.

In December of '85, a report was written by Mr. Goldberg and Mr. Ogden, over the signature of Mr. Paul Somerville, who is the principal of the school.

I would like the Court to look at [6] that and will indicate roughly what this report indicates and I will show it to the District Attorney before handing it up to the court.

My client was graded excellent in work habits, attitude, behavior, participation.

He was graded in only one other area and that was fair in the matter of skills, but that is, of course, the argument that we are making, that that is precisely what part of the problem is, is that his skills have been poor and probably but for that, among other factors, he may not – he may not be here at all.

Mr. Goldberg is the teacher. Mr. Goldberg indicated that my client has been cooperative and thorough in

school. He contributes in class and helps others who are not as capable.

Mr. Ogden, the counselor, indicated that John has a positive self concept and gives every indication that he will strive to develop meaningful objectives.

This report was made not at my behest, Your Honor. I would also like to add [7] that. My client handed this to me sometime ago, a month or so ago, without any request by me at that time.

He has, in addition, Your Honor, no prior convictions. There appears to be some question about a robbery, an arrest for robbery, which I am not sure of the status of, but he has no prior convictions.

His school record outside of the Youth Study Center school record, admittedly, has been poor. – He was a truant. He did not attend school with any great regularity, but I would like to point out to the court that for the two year period prior to the time of his arrest, he was, undoubtedly, a substance abuser.

His mother was aware of the problem prior to the time of his arrest. She has indicated to me that she found pills repeatedly on the person of my client or in his effects, among his effects or in his room.

She had him sent or the system had him sent to 48th and Parkside to the school there, to try to treat this problem and it remained [8] untreated or at least uncorrected until the time of his arrest.

At the time, on the night of his arrest, on the 18th of September, my client was clearly intoxicated. He had

ingested three valiums, had smoked reefer and had been drinking the better part of the evening.

Since the time of his incarceration, he is drug free. His family, as a matter of fact, his mother spoke with me and indicated that since the time of his arrest, her son has mentally markedly improved in his attitude, in his ability to cope with reality, which was one of the biggest problems that apparently she had had before the time of his arrest.

He lived with his mother and his siblings at 4936 Thompson Street up until the time of his arrest.

My client has a great deal of personal support from his family and I would like the Court to take judicial notice of the fact that on the left side of the Court, the entire [9] left side of the Court is filled with Mr. Pace's family. His father and his mother are both here, and they had been highly supportive of him and very concerned about, all around, the effects of the general tragedy both for Mr. Baldwin, of course, and for John.

Your Honor, because of the ambiguity of the act, and because of the ambiguity of the wording of the act, it is very difficult for counsel to know just exactly what would persuade this Court or any other court, for that matter, to make a determination that an individual should be sent back to juvenile court.

THE COURT: I have reviewed some of the most recent cases, and as I understand, once a prima facie case of murder has been made out, the criminal courts have original and exclusive jurisdiction and the burden of proof is on the juvenile to show that he does not belong in criminal court, and there are two rather recent court cases which set forth that as the law.

MS. DUNWORTH: One is the Brown case.

[10] THE COURT: That's one, and Pyle.

But there are some cases that indicate what the standard is, and as I understand it, the burden requires that the juvenile prove that he belongs in a juvenile setting by showing his need and amenability to the program of supervision and care and rehabilitation he would receive as a juvenile.

If the evidence does not affirmatively demonstrate, and that's really your burden, that the defendant would benefit from the special features of the programs, and that no special – and if no special reason is shown for sparing him from adult prosecution, jurisdiction remains here.

So really what I think you have to say is that he is amenable to supervision, and you must affirmatively demonstrate that he would benefit and there should be a special reason for sparing him adult prosecution, and factors involved would be the nature of the crime itself, a review of the individual's personal makeup, previous history and nature and circumstances of [11] the homicide.

You have indicated to me his age. I understand he was in the tenth grade. He had completed. the tenth grade, that he has no prior juvenile record, that he was not attending school regularly.

MS. DUNWORTH: Your Honor, may I –

THE COURT: And he was a drug user.

MS. DUNWORTH: Yes, sir. May I interrupt you?

He does have contact with the system in terms of arrest. There were a couple of arrests, but he has no

convictions. I think the Court should be aware of that, and I am sure Mr. Gallagher would point that out to you.

The point that I am trying to make is that with the limited contact that my client – he has never been incarcerated before, needless to say, but with the limited contact; that is, a period of five months that he has been in contact with the system; that is, since the time he has been incarcerated in September, he has attended [12] the school.

He has done very well in school. The report has been as I indicated, excellent in every area that would involve my client's corporation, and my client's input into the system that he is working with, Your Honor.

I would ask the Court to particularly note that in view of the fact that prior to that time, he was a substance abuser. Since that time, he has not been a substance abuser.

THE COURT: What do you call that?

MS. DUNWORTH: Substance abuser, Your Honor. By that I mean there's no specific thing that he was in the habit of taking. He took whatever was apparently available at any given time.

On the night of his arrest, he was probably intoxicated with three different forms of –

THE COURT: Miss Dunworth, with all due respect, I will take into account that since he has been in custody, he has attended school and [13] made progress, of course, and that letter may be marked, and I will review it.

The thing is you really have to show I think something beyond that here, because the case comes to this Court and it is only decertified if there is some special reason to decertify it.

In order to sustain that burden, I have to know more about the crime involved, more about what this defendant was charged with. He is close to 18.

MS. DUNWORTH: He is now, Your Honor. But he was less than 17 and a half at the time.

THE COURT: What I really want to do is give you a full opportunity to present whatever evidence that you want and if there's anyone you want to call or anything you want to present or anything that can be stipulated to along the lines of what is relevant, I will be glad to hear it, and if you call any witnesses, of course, they can be cross-examined and the Commonwealth can call witnesses. Then I will hear [14] argument.

What you are really doing is submitting an argument.

MS. DUNWORTH: Yes.

THE COURT: Before you do that, I want to make sure that the record is complete. So far, what I have on the record is that the defendant was 17 at the time. He was a student in tenth grade.

He has no prior convictions though he does have contact with the law as a juvenile. He did not attend school regularly. He was a substance abuser.

On the night of the episode, he was on drugs and alcohol, and that he attended school during his incarceration and did well.

That's the state of the record. Is there anything else you want to introduce?

MS. DUNWORTH: I think, Your Honor, you have a brief rundown of the incident and the charges came out of that incident.

Mr. Baldwin is alleged to have been walking in the area of 46th and Market, and this [15] was early in the morning, approximately around 5:00.

THE COURT: How old was he?

MS. DUNWORTH: Mr. Baldwin was in his fifties, Your Honor.

Apparently, both parties were walking towards each other. The statement that was given by my client, he gave two statements, one at the time of his initial arrest before Mr. Baldwin died and the second, subsequent to Mr. Baldwin's death, when he was charged with murder.

He indicated that, and was fairly consistent in both statements, that both people; that is, my client and Mr. Baldwin were walking in opposite directions toward each other.

Mr. Baldwin apparently said something to my client, such as what are you doing, or something to that effect. My client said what do you mean. He said I know what you're up to; that is, Mr. Baldwin.

Mr. Baldwin, according to the statement, reached out to my client. My client had a blackjack in his pocket.

[16] He hit Mr. Baldwin with the blackjack. He did not rob Mr. Baldwin. There is certainly an intimation that my

client may have contemplated that, at least according to the statements. There were two statements.

My client walked away from Mr. Baldwin, and, apparently, there was an officer who was in a patrol car, Officer Little, who witnessed the latter part of the incident.

I think it significant, your Honor, that the officer indicated in the statement that he gave subsequent to this, to the arrest of my client for murder, that it looked to him like a fistfight was ensuing, so it's a very ticklish question as to when the intent to rob occurred.

THE COURT: For the purposes of this motion, I don't know that. What you really told me is the substance of the crime is that the deceased was a 46 year old man.

MS. DUNWORTH: In his fifties.

THE COURT:

[Illegible] This defendant is charged with killing him with a blackjack during the course of [17] a robbery.

Ms. [Illegible]

THE COURT: I'm not at this point at all seeking to [illegible] his guilt or innocence and his presumption of innocence remains with him but the nature of the crime is a striking with a blackjack on 46th and Market of a 50 year old man after some words occurred, while he was under the influence of drugs and narcotics.

MS. DUNWORTH: Exactly. The question then remains, your Honor, I think for the Court's consideration with regard to the seriousness of the charges, is that it was a spontaneous act, that there was a weapon involved

from the point of view of the Commonwealth; however, the weapon had not been drawn prior to the time of these words.

It was after these words had taken place that the weapon and after, apparently, the defendant, Mr. Pace, assumed that there was some kind of aggressive action on the part of Mr. Baldwin.

I know I am getting beyond the area [18] for the Court's consideration.

THE COURT: What other reasons, what other evidence do you want to present that would make this a special circumstance or make this the type of circumstance that should be removed from the criminal court system?

It seems, in all candor, that the most significant thing you have is that he has done well at the school afterwards, and I am not trying to minimize that or demean it, but I don't know if that alone warrants decertification under the law.

You may introduce whatever else you wish.

MS. DUNWORTH: Your Honor, I don't have any other argument to make. I just believe that given the personality of this young man, and I have spoken with him many times. I have spoken with his family. I believe that from close contact with the family, that he is very much aware of the seriousness of his position, of the seriousness of the charges, your Honor.

He feels remorse for the entire [19] incident, and I believe that he is, I truly believe that he is amenable to treatment in the juvenile system.

His family certainly believes that. I have input from his brother, who has cal. d me repeatedly, spoken to me about how his brother is doing in school, what his brother's mental state is, how his brother feels about this matter.

Your Honor, I can't do magic. I can't make anything appear that isn't the case. I would just ask the Court to consider the facts that I have presented to the Court, and the intangible factor of this young man's particular own unique personality which I believe, his family believes would render him amenable to treatment and supervision of the juvenile system, and that being the case, your Honor, I would ask the Court to transfer him back to the juvenile system.

THE COURT: Is there anything else you want to present, any other witnesses that you want to testify?

Is there anything you wish to [20] present on behalf of this motion?

MS. DUNWORTH: No, I have no other information to present to the Court.

THE COURT: Thank you.

MS. DUNWORTH: Thank you.

MR. GALLAGHER: Your Honor, I believe what we have heard so far is argument from counsel based on allegations that she has, based on her review of the case.

I respectfully submit to the court that as far as the Commonwealth is concerned, I can stipulate to his age, I can stipulate to the fact that he finished the tenth grade,

and I can stipulate to the fact that there are no adjudications in juvenile court.

I have a copy of an extract of juvenile contracts, and I would submit that to the Court as evidence.

Judge, as far as the other arguments of counsel, we have no evidence to that effect except counsel's reliance upon her review of the case, and I would respectfully submit to the Court even if all that counsel has argued to [21] the court today was presented via testimony, there isn't a sufficient amount of facts there to overrule or to carry her burden or carry the defendant's burden as to why this case would be properly in the juvenile court.

As the Court has indicated and the state of the law is clear that it is the burden of the defendant to prove.

It is clear, even taking counsel's arguments, that we have a picture of an individual here who I believe is clearly not amenable to rehabilitation in the juvenile system due to the fact, Judge, that in a little bit more than two months, he will be 18 years old, and in that situation, Judge, he would not be permitted in any juvenile facility.

Secondly, your Honor, when we take into consideration the facts of this case, if the Court wishes, I will submit the statements at this stage of the defendant and also, I have today testimony from the arresting officer, and your Honor, it is up to the Court to determine, based upon a review of those statements and the [22] testimony, as to what actually occurred here.

Counsel, with all due respect to counsel, has put a favorable light on this incident as far as indicating that there may have been some aggressive behavior by the victim, and I would submit, your Honor, that your review

of the statements as well as the testimony of the police officer indicates completely to the contrary.

THE COURT: Just as I suggested to Miss Dunworth, I suggest to you, as far as I am concerned, I'm not determining the guilt or innocence.

I am satisfied that it was a killing with a blackjack on the street.

MR. GALLAGHER: Fine, Judge. And it was in the course, I believe it was in the course of a robbery and that's clear from the statements.

THE COURT: May the letter be introduced and marked as C-1.

Also, may the juvenile record be marked and introduced as D-1, so it will be available and the record is clear.

[23] MR. GALLAGHER: Your Honor, I believe you want the letter as D-1 and the juvenile record as C-1.

THE COURT: That isn't what I said but that's what I meant to say, Mr. Gallagher.

(Extract of Juvenile Record was marked Commonwealth Exhibit C-1 for identification, and Report from the Youth Study Center School was marked Defense Exhibit D-2 for identification).

MR. GALLAGHER: Judge, counsel has had an opportunity to view what is marked C-1.

I have not had the opportunity because I mistakenly thought it would be here, the J file of the defendant which indicates the course of those contacts. In fact, there were

three contacts prior to this incident, Judge, and one of which is still open.

There's an open bench warrant issued by Judge Poserino on October 9, 1985, based on a robbery charge from November 27, 1984.

I believe that bench warrant was issued because the defendant was incarcerated on [24] this offense, but regardless, Judge, that is still an open offense.

I know what the facts of that offense are. I determined that through the detectives but I don't have that information here in Court today. I have been on the phone all morning trying to get it over here.

THE COURT: The juvenile record shows three previous contacts, one withdrawn, one no disposition and one an open bench warrant.

I also have D-1, which does show that at the Youth Study Center school, the defendant was making progress.

Can I see counsel for a moment?

(Whereupon, an off the record discussion was held in the anteroom).

(The following occurred in the courtroom:)

THE COURT: With respect to the motion to decertify, under the existing law, I don't think it would be appropriate for this Court to remove this case to the juvenile court.

There has been nothing presented [25] and there is no indication that there is a need and amenability for this

defendant to the program of supervision, care and rehabilitation that he would receive as a juvenile.

The Court finds that the evidence does not affirmatively demonstrate that the defendant would benefit from the special features of the programs in the juvenile Court system, and the evidence shows no special reason for sparing him from adult prosecution and punishment if and when the defendant is found guilty.

So the motion to decertify is denied.

It is twenty of one. We will proceed this afternoon. How do you contemplate proceeding, Miss Dunworth?

MS. DUNWORTH: Your Honor, I believe that a guilty plea is in agreement. We are in agreement that a guilty plea is in order, your Honor.

I will confer with the family again to make sure that that is their wishes and with my client, and when we come back, we will indicate [26] that to the court.

THE COURT: I would appreciate if you would confer fully again with the defendant and his family, and if the defendant wishes to enter a plea of guilty, I will ask him some questions concerning it to make sure that it is freely and voluntarily entered.

(Luncheon recess)

AFTERNOON SESSION.

MS. DUNWORTH: I apologize for my lateness but I had another engagement. I had to fit it in.

THE COURT: That's all right.

This is Commonwealth versus Pace. We are prepared to proceed. I understood before the luncheon recess that it may be a guilty plea.

Is that correct?

MS. DUNWORTH: Yes, sir.

THE COURT: If the defendant would rise and be sworn, I would like to ask him certain questions.

[27] THE CRIER: Place your right hand on the Bible. State your full name.

THE DEFENDANT: John Pace, P-A-C-E.

. . . JOHN PACE, after having been duly sworn, was examined and testified as follows:

THE COURT: To what does the defendant intend to plead guilty?

MS. DUNWORTH: Second degree murder, your Honor.

THE COURT: What about the other charges?

MS. DUNWORTH: And to P.I.C., and I believe the other charges will be nol prossed.

THE COURT: There's a voluntary manslaughter bill and a robbery bill.

MR. GALLAGHER: Yes, your Honor. It is my understanding that the defendant will plead guilty to bill 1272 of January term – excuse me, of October term, 1985, and bill 1275 of October term, 1985.

1272 is for possession of an instrument of crime, and 1275 is for murder in the second degree.

[28] Judge, upon the acceptance by the Court of that plea, if the Court does accept that plea, the Commonwealth is prepared to nol pros the other two remaining bills.

THE COURT: Mr. Pace, it has been indicated to me that you wish to enter a plea of guilty.

THE DEFENDANT: Yes.

THE COURT: To the charge of second degree murder and possessing instruments of a crime generally as set forth in bills of information October, '85, Number 1272 and 1275.

Is that correct?

THE DEFENDANT: Yes.

THE COURT: It has been further indicated to me that the charges of robbery and involuntary manslaughter and possession instruments of a crime weapon will be nol prossed if the plea is accepted.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: How old are you?

THE DEFENDANT: 17.

[29] THE COURT: What's the date and year of your birth?

THE DEFENDANT: 4/28/68.

THE COURT: Are your parents in this courtroom today?

THE DEFENDANT: Yes.

THE COURT: Would Mr. and Mrs. Pace be kind enough to come forward and be seated so that I can address you. I would appreciate it very much. Let them be sworn.

THE CRIER: Place your right hand on the Bible. State your full name.

THE WITNESS: Dorothy Clemmons.

THE CRIER: State your full name.

THE WITNESS: Morris Clemmons.

. . . DOROTHY CLEMMONS and MORRIS CLEMMONS, after having been duly sworn, were examined and testified as follows:

THE COURT: Mrs. Clemmons, you are the mother of the defendant, John Pace?

MRS. CLEMMONS: Yes, I am.

THE COURT: Mr. Clemmons, you are his father?

[30] MR. CLEMMONS: Yes, I am.

THE COURT: Was he living in your home at the time of this incident?

MR. CLEMMONS: He is living with his mother.

THE COURT: And you are separated?

MR. CLEMMONS: Yes.

THE COURT: I appreciate you being here. You may have a seat.

THE COURT: Mr. Pace, how far did you go in school?

THE DEFENDANT: Tenth grade.

THE COURT: Can you speak and understand English?

THE DEFENDANT: Yes.

THE COURT: Do you read and write English?

THE DEFENDANT: Yes.

THE COURT: Are you now under the influence of alcohol or any other drug?

THE DEFENDANT: No.

THE COURT: Have you understood everything that I have said so far?

[31] THE DEFENDANT: Yes.

THE COURT: Have you ever been in a mental institution or received treatment for mental illness?

THE DEFENDANT: No.

THE COURT: Miss Dunworth, do you know if the defendant is now suffering from any physical, mental, or emotional problem which might affect his understanding everything that is said today?

MS. DUNWORTH: No, I do not.

THE COURT: Mr. Pace, are you now suffering from any physical, mental or emotional problem which

might affect your understanding everything that is said today?

THE DEFENDANT: No.

THE COURT: Pardon me? You're not?

THE DEFENDANT: No, no.

THE COURT: Miss Dunworth, have you fully discussed this case with your client and fully investigated every question which either of you may have?

[32] MS. DUNWORTH: Yes, sir.

THE COURT: I say to you Mr. Pace, have you fully discussed this case with your lawyer and are you satisfied that she knows all the facts and has had time to fully investigate your case?

THE DEFENDANT: Yes.

THE COURT: To Mr. and Mrs. Clemmons. Have you discussed this case with Miss Dunworth, Mrs. Clemmons?

MRS. CLEMMONS: Yes.

THE COURT: Are you satisfied that she fully investigated it?

MRS. CLEMMONS: Yes.

THE COURT: Have you talked about this plea with your son?

MRS. CLEMMONS: Yes.

THE COURT: Are you satisfied that he understands what is going on today and he is not in any way emotional or fully impaired?

MRS. CLEMMONS: Yes.

THE COURT: He is okay?

MRS. CLEMMONS: Yes.

[33] THE COURT: Mr. Clemmons, are you satisfied that your son is aware of what is going on today?

MR. CLEMMONS: Yes, I am.

THE COURT: Have you discussed this with his lawyer?

MR. CLEMMONS: I did, with the understanding, with the exception of the second bill for possession of a weapon.

THE COURT: Are you satisfied that she has investigated the case properly and fully understands the case?

MR. CLEMMONS: Right.

THE COURT: Mr. Pace, are you satisfied with your lawyer?

THE DEFENDANT: Yes.

THE COURT: I want you to know this. Regardless of what you may have said before or regardless of what anyone has told you, you will be bound by the answers that you give today and by what you say today.

Do you understand that?

THE DEFENDANT: Yes.

[34] THE COURT: Do you understand that even though you are guilty, or may be guilty, you are presumed to be innocent.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: In fact, you don't have to prove anything unless you choose to do that.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, you have the right to plead not guilty and have a trial before a Judge and a jury or before a Judge alone.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And by pleading guilty, you give up that right.

Is that clear?

THE DEFENDANT: Yes.

THE COURT: If you plead not guilty, you do not have to admit anything.

Is that clear to you?

THE DEFENDANT: Yes.

THE COURT: The Commonwealth cannot [35] force you to testify and if you do not testify, that cannot be held against you.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you plead not guilty, and elect to be tried before a jury, that jury will consist of twelve persons from the community in which you live; Philadelphia, and you and your lawyer would participate in selecting the jurors.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: In selecting the jurors, your lawyer, with your participation, could have excluded from the jury anyone who couldn't be a fair and impartial and unprejudiced juror.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: There's an unlimited number of challenges for cause that your lawyer could, have.

Do you understand that?

[36] THE DEFENDANT: Yes.

THE COURT: Also, your lawyer would be entitled to a certain number of peremptory challenges.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: That means she could exclude from this jury for any reason whatsoever a certain amount of prospective jurors as proscribed by law.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you plead not guilty, and you are tried, by a jury, which you and your lawyer would be able to participate in the selection of, you could not be found guilty unless and until all twelve jurors unanimously found you guilty.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you also understand that you may plead not guilty and be tried before a Judge, without a jury?

[37] Is that clear?

THE DEFENDANT: Yes.

THE COURT: In that event, the Judge would hear the evidence and decide whether you are guilty or not guilty.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you plead not guilty, and have a trial, either before a Judge or a jury, you cannot be found guilty only if the Commonwealth proves you guilty beyond, a reasonable doubt.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, a reasonable doubt is that kind of a doubt that would restrain a reasonable person from acting or cause him to halt, hesitate or refuse to take action in a matter of highest importance to himself.

Is that clear to you?

THE DEFENDANT: Yes.

THE COURT Now, if you go to trial and plead not guilty, the Commonwealth must be present witnesses who would testify about the case.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And these witnesses would have to testify under oath and could be questioned or cross-examined by your lawyer.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, if you plead guilty, the Commonwealth may simply read a summary of what the witnesses would say if they were here and that means you are giving up your right to confront or question these witnesses.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand if you plead not guilty, and have a trial even though you do not have to

say anything or prove anything, you may testify at the trial, you may call witnesses to testify for you.

Do you understand that?

THE DEFENDANT: Yes.

[39] THE COURT: By pleading guilty, you give up these rights.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: By pleading guilty, Mr. Pace, you are saying; that you committed the acts that the Commonwealth says you did.

Is that clear?

THE DEFENDANT: Yes.

THE COURT: In other words, you give up your presumption of innocence, and your right to require the Commonwealth to prove your guilt beyond a reasonable doubt.

Is that clear to you?

THE DEFENDANT: Yes

THE COURT: When you plead guilty, Mr. Pace, you also give up your right [Illegible] evidence which may have been obtained from a search of your person or premises.

You also give up [illegible] question the admissibility of any statement you may have [illegible] police, and you also give up [40] your right to question the admissibility of

any identifications of you by any of the Commonwealth's witnesses.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: In this case, if there is a statement, you would have a right to move to suppress that statement but if you plead guilty, you give up that right.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: When you plead guilty, Mr. Pace you are giving up your right to present evidence of any defense, justification or excuse as to your guilt.

Is that clear?

THE DEFENDANT: Yes.

THE COURT: Now, you understand if I accept this guilty plea, it will have the same effect as if you went to trial and were convicted.

Do you understand that?

THE DEFENDANT: Yes.

[41] THE COURT: When you plead guilty, you also give up virtually – you give up almost all your rights to appeal.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: When you plead guilty, you have no right to appeal except you can appeal whether your plea was voluntarily made.

You can appeal the question of the jurisdiction of the Court, and you can appeal the legality of the sentence which is imposed, but other than that, you can't appeal at all.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: I wouldn't accept your plea if it weren't voluntarily given.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: I understand from counsel that this is a plea to murder in the second degree and that the Commonwealth has agreed – that this is a plea to second degree murder and possession of instruments of a crime generally, [42] and the Commonwealth has agreed to nol pros the other bills and that there are no further agreements of any kind; is that correct?

MR. GALLAGHER: That is correct, your Honor.

THE COURT: Is that correct?

MS. DUNWORTH: That is correct, your Honor.

THE COURT: Now, you understand, Mr. Pace, that if you plead guilty, and I accept the plea, there are no negotiations or understandings and it will be up to me to sentence you.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If I find, after hearing a summary of the offense and the circumstances, that I cannot accept this plea because I believe that there is sufficient evidence that warrants a trial on a more serious charge, such as first degree murder, then I will permit you to withdraw your plea, and you can be tried before a jury.

[43] Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If I find after hearing the summary that there is insufficient evidence to warrant a plea for murder of the second degree, I would permit you to withdraw your plea.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Has anyone threatened you to enter this plea?

THE DEFENDANT: No.

THE COURT: Has anyone forced you to do it?

THE DEFENDANT: No.

THE COURT: If I find you guilty or if I accept the plea to second degree murder, you must know that the sentence is life imprisonment.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: I will have no discretion to sentence you less than that.

Do you understand that?

THE DEFENDANT: Yes.

[44] THE COURT: And if you plead guilty to second degree murder, and you are found guilty of second degree murder, the sentence will be life imprisonment.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: With regard to possessing instruments of a crime, the maximum sentence for that is two and a half to five years in jail.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And I could, if I wish, impose that sentence in addition to the life imprisonment although I need not do that.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, murder in the second degree exists where the death occurs, where the death of the victim occurs, and in this case Randolph Baldwin is the victim, murder of the second degree is where the death of Randolph Baldwin occurred while you were engaged as the [45] perpetrator in the commission of or an attempt to commit robbery, and robbery is inflicting or threatening to

inflict or intentionally putting a victim in fear of immediate serious bodily injury when in the course of committing or attempting to commit a theft.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you admit that you committed that offense?

THE DEFENDANT: Yes.

THE COURT: Are you saying that you caused the death of Randolph Baldwin by striking him with a blackjack while you were robbing or attempting to rob him?

THE DEFENDANT: Yes.

THE COURT: Now, you know what the sentence could be. Do you still wish to plead guilty?

THE DEFENDANT: Yes.

THE COURT: At this point, ordinarily, I would ask the Commonwealth to summarize the evidence against the defendant with [46] respect to his guilt.

Before doing that, is there anything you want to say concerning the proceedings at this point, Miss Dunworth?

MS. DUNWORTH: No, I do not, your Honor.

THE COURT: Is there anything that either Mr. or Mrs. Clemmons want to say about the proceedings thus far?

MR. CLEMMONS: No, sir.

MRS. CLEMMONS: No.

THE COURT: Mr. Gallagher, you may present a summary of the evidence.

MR. GALLAGHER: Thank you, your Honor.

Your Honor, if the Commonwealth was to proceed to trial in this case, the Commonwealth would present the following witnesses and the following testimony.

Judge, so that you can follow, I have taken the liberty to make a copy of some or the statements that I would like to read into the record as well as the post mortem report.

[47] All of these items have been given to counsel as a result of her discovery request. Just so she knows what I am handing up to the Court, I will indicate that it is the statement of –

THE COURT: Why don't you mark them for identification so they can be a permanent part of the record.

You can start with C-1, because the other proceeding was really the motion and was a different proceeding.

MR. GALLAGHER: Yes, sir.

C-1 is a statement by Officer Leonard Little.

The statement was taken on the fourth of October, 1985.

THE COURT: Is it a statement of Officer Little or a statement of the defendant taken by Officer Little?

MR. GALLAGHER: It is a statement by Officer Little.

(Investigation Interview Record of Officer Leonard Little was marked Commonwealth [48] Exhibit C-1 for identification).

MR. GALLAGHER: C-2 is a statement by the defendant, John Pace, given to Detective Gerald Davis on September 18, 1985.

(Investigation Interview Record of John Pace, the defendant, was marked Commonwealth Exhibit C-2 for identification).

MR. GALLAGHER: C-3 is the post mortem report filed in this matter by the coroner.

(Post mortem report was marked Commonwealth Exhibit C-3 for identification).

MR. GALLAGHER: C-4 is a statement by the defendant, John Pace, given to Detective Rocks of the Homicide Division on Monday, September 30, 1985.

(Investigation Interview Record of John Pace, the defendant, was marked Commonwealth Exhibit C-4 for identification).

MR. GALLAGHER: Judge, if the Commonwealth were to proceed to trial, it would call initially a family member, and I would like to indicate for the record there are three family [49] members of the deceased in the courtroom, his wife, Maude Baldwin, his daughter, Beatrice Harwood, and his son, Randolph Baldwin are in the courtroom.

I would call on the family members and they would testify that on September 18, 1985, the deceased, Randolph Baldwin, was alive and living at 127 North

Conestoga Street in Philadelphia; that at that time, he was 56 years old; that at that time, approximately four in the morning, they would indicate although, your Honor, they do not live with him at that address, they would indicate it was his normal practice to leave early in the morning to proceed to work in Pascataway, New Jersey, and he would leave his house, walk to the elevated on Market Street, and proceed to take the train to Trenton and then get a ride to Pascataway, to report for work at 8:00 in the morning, so it was at that time that he was on his way to work.

The next witness I would call would be police officer Leonard Little and his statement has been marked as C-1.

[50] Your Honor, if I may, I would like to read his statement. It's not that lengthy, for the record.

Your Honor, police officer Leonard Little, badge number 3649, of the 18th district, would testify that on September 18, 1985, he was assignee to the 18th police district working radio patrol car 1819 on the midnight to eight a.m. tour of duty.

He would testify further that on September 18, 1985, at approximately 4:35 a.m., he was traveling east on Market Street and 53rd Street.

"I observed what I thought was a fight in front of the funeral home, which is located at 18 North 53rd Street in Philadelphia. The male, later found to be John Pace, had his hand out holding the man and he was striking the man with the other hand about the head.

"As I turned north on 53rd street, he, that is, the defendant, Pace, struck the man again and when he saw me, he began walking north on 53rd Street.

[51] "The man; that is, the deceased, had fallen to the ground. As Pace walked away, he threw something out of his right hand into a breezeway between houses at 24 and 26 North 53rd Street.

"I stopped Pace, and I placed him into my car, and I notified police radio of the incident. I backed up to the complainant, and he was on the ground and I noticed about three different marks on his head. He was laying on his back and his waist down was in the street and the upper part of his body was in the sidewalk. His head was facing in a southwest direction. He was semi-conscious and when I talked to him, he was incoherent.

"I called for fire rescue and they transported him to Presbyterian Hospital. While I was waiting for rescue, I went into the breezeway and I recovered a leather flat blackjack from the ground.

"I placed the blackjack on a property receipt and took it to the evidence custodian.

[52] "I went to Presbyterian Hospital to attempt to get a statement from the complainant but he was incoherent.

"The defendant, Pace, was transported to 18th district by emergency patrol wagon number 1803".

Judge, also today, Officer Little is here, and he has the blackjack if the Court would like to see it.

THE COURT: As a matter of fact, I think it ought to be marked.

MR. GALLAGHER: I wrote like to have it marked as C-5.

(Blackjack was marked commonwealth Exhibit C-5 for identification).

MR. GALLAGHER: Your Honor, the officer was asked "How many times did you observe John Pace strike Randolph Baldwin?"

The answer was "two or three times".

"Question: At any time, did Randolph Baldwin say anything to you either on the scene or in Presbyterian Hospital?

[53] "Answer: He was jabbering incoherently.

"Question: Can you describe any physical injuries which you observed on Baldwin after he was knocked on the ground?

"Answer: I saw what happened to be bruises on his head. He was dressed like he was going to work.

"Question: Did you observe anything on the ground on the scene where the incident took place?

"Answer: There was a small brown bag on the ground, about three or four feet from Baldwin to the south of him. I thought it might have been his lunch.

"Question: Did you observe any physical injuries to John Pace?

"Answer: Only that his jacket was ripped.

"Question: Were there any other witnesses to the incident besides yourself?

"Answer: No, but people came out after the incident".

[54] Judge, that would be basically the sum and substance of Officer Little's testimony.

Your Honor, I would then introduce the statement taken by detective Gerald Davis of West Detective Division at approximately 7:16 a.m., on the date of the incident, 9/18/85, from the defendant, John Pace, at West Detective Division inside the juvenile room at West Detective Division in the presence of the defendant's mother, Dorothy Clemmons.

After giving the defendant his Miranda rights, the following questions and answers were given:

"Question: John, would you tell me in your own words what caused you to be arrested this morning?"

Also, your Honor, prior to the statement, Detective Davis informed the defendant of what he was there for, why he was arrested and what he was charged with.

The answer by the defendant was as follows: "Well, I left my house last night about eleven p.m., and I went to Roger Lovette house at [55] 111 North 56th Street. When I left my house, I had a slapjack with me.

"About 4:25 a.m., I left Roger's house and I saw this old black man walk at 18 North 53rd Street. I decided to rob him, and I walked up to him and pushed him and he reached me and grabbed me. My blackjack fell out of my rear pocket, and I picked it up and hit him a couple of times on his head and he fell down.

"Just then a cop came up and arrested me".

As I indicated, that statement was given on September 18th, shortly after the arrest.

In addition, your Honor, I would move, via testimony or stipulation, as far as the examination done by the Medical Examiner's office.

The examination was done on September 29, 1985, 8:35 a.m.

Judge, there would also be testimony to the fact that the defendant – excuse me – the deceased was in Presbyterian Hospital [56] from the date of the incident, 9/18, until he expired on 9/28/85, and during the course of his treatment there, it is my information from the report from Presbyterian Hospital that he never regained consciousness.

Your Honor, the testimony from the Medical Examiner would indicate that the deceased was five feet four and one quarter inches, and he weighed 122 pounds; that the cause of death was craniocerebral injuries caused by a blunt instrument, and the manner of death was homicide.

Your Honor, I have also provided the Court with a full copy of the Medical Examiner's report which detailed the internal and external injuries that resulted in the death of the deceased.

Judge, finally, I would call Detective Edward Rocks of the Homicide Division, and he would testify as to the statement taken from the defendant after he was subsequently arrested on September 30th, due to the fact that the deceased had expired on September 28th.

Detective Rocks would testify to [57] the fact that the defendant was given his full Miranda rights in the presence of his mother, Dorothy Clemmons, that there was some time for the defendant and his mother to confer, that

after conferring, the defendant gave the following statement, and I will read the questions and answers into the record.

"John, I have showed you and your mother, Dorothy Clemmons, the copy of arrest warrant 140358, and you have been given your warnings.

"Can you tell me in your own words about the robbery and beating of Randolph Baldwin, 56 years old, on 9/18/85, at 4:35 a.m. hours on the highway at 18 North 53rd Street?

"Answer: On that night, I left my house at eleven something, and I went down 56th and Arch Street and I went to my friend's house. His name is Roger Lovette. I left there around 3:30 to walk home. I walked up Market Street and I turned up 53rd Street toward Arch Street.

"I saw the man walking towards Market Street on the same side of the street as [58] me. We were facing each other and we passed each other.

"When he passed me, he stopped and looked at me. I asked him what was he looking at. He told me to get out of here, that he knew what I was up to.

"I had the blackjack in my right back pocket and he swung at me. We was grabbing each other and I pushed him to the side and I hit him with it.

"I just hit him once and the police came up. I was going to rob him but I didn't take anything from him.

"Question: When you struck the man with the blackjack, what position was his body in?

"Answer: He was leaning over halfway on hi[illegible]e.

"Question: What part of the man's body did you strike with the blackjack?

"Answer: I hit him on the side of the head.

"Question: What did the man do when [59] you hit him in the head with the blackjack?

"He fell backwards and I started walking and that's when the cops came.

"Question: Can you describe the blackjack?

"Answer: It was a black leather flat slapjack".

The defendant was shown a slapjack by the detective, Detective Rock, and he stated it was the same type but his was bigger.

"Question: John, where did you get the slapjack?

"Answer: I got it that night from Roger Lovette because I had to walk home at 4:00 in the morning.

"Question: Why did the man swing at you.

"Answer: Because he thought I was going to rob him.

"Question: Can you describe the man that you struck with the slapjack.

"Answer: He was about my size and he had a hat on. He was wearing a tan coat and brown [60] pants on.

"Question: How much money did you have in your possession when you were walking home when this incident occurred?

"Answer: I didn't have any money.

"Question: John, do you remember having a conversation with Sergeant McDonnell on 9/18/85, at about 0500 hours inside the 18th district at 3500 Pine Street?

"Answer: Yes.

"Question: Do you remember what you told the Sergeant?

"Answer: I asked how the man was doing and I said I was sorry. I said that I didn't want to hit him. I just wanted some money.

"Question: Why did you hit the man with the blackjack.

"Answer: Because I thought he was going to hit me.

"Question: Did the man have anything in his hands of any kind or any kind of a weapon?

"Answer: He only had a little brown [61] paper bag in his hand.

"Question: When did you first see the police.

"Answer: When I started walking away.

"Question: John, after you struck the man with the slapjack, what did you do with the slapjack?

"Answer: I saw the police car coming and I threw it inside a yard.

"Question: Did you strike the man with your fist before you hit him with the slapjack?

"Answer: No. I grabbed him by his jacket and I threw him on the ground and when he was getting up, that's when I hit him with the jack.

"Question: Where does Roger Lovette live?

"Answer: He lives at 11 North Arch Street. Okay, let me tell you the truth. I got the blackjack earlier in the week and I went into somebody's car and took it. The Sunday before, [62] there was a small car around the corner with the window down. I went into the car and the blackjack was on the floor in the back. That's all I took [illegible]

"Question: Can you read, write and understand the English language?

"Answer: Yes.

"Question: [Illegible] the influence of alcohol or narcotics?

"Answer: [Illegible].

"Question: What was the last grade you completed in school?

"Answer: 9th grade.

"Question: Are you making this statement of your own free will and presence of your mother, Dorothy Clemmons?

"Answer: Yes.

"Question: Why are you making this statement?

"Answer: I want to get everything right and it is the truth".

Your honor, this statement was [63] signed by John Pace on 9/30/85, at 5:50 p.m., and it was also signed by Dorothy Clemmons, 9/30/85, at 5:30 p.m.

I would also add, point out the fact that the defendant is five eight and 147 pounds at the time of his arrest, on September 18, 1985.

With that, your Honor, the Commonwealth finishes its recitation of the facts.

THE COURT: Thank you very much.

Mr. Pace, you heard the summary presented by the Commonwealth; have you not?

THE DEFENDANT: Yeah.

THE COURT: Do you admit doing what the Commonwealth said you did?

THE DEFENDANT: Yes.

MS. DUNWORTH: Your Honor, may I speak with the parents of Mr. Pace just to go over one particular point that Mrs. Clemmons brought out to me?

THE COURT: Sure.

(Whereupon, an off the record [64] discussion was held among counsel and Mr. and Mrs. Clemmons).

MS. DUNWORTH: Very well, your Honor. Thank you.

THE COURT: You heard the summary. I believe you told me that what was presented is, in fact, the truth.

Is that correct?

MS. DUNWORTH: Yes.

THE DEFENDANT: Yes.

THE COURT: Is there anything else about this incident that you want to tell me?

THE DEFENDANT: That, you know, I didn't really mean to do it, what happened. I'm sorry. I'm sorry.

THE COURT: Well, unjustification, self-defense, could be a defense in this case.

Are you suggesting that you only did it out of self-defense or did you do it because you intended to rob him?

Now, I know you are sorry about it but did you intend to rob this man?

THE DEFENDANT: Yeah, I intended to [65] rob him but, you know, what happened wasn't meant to happen.

THE COURT: Again, are you admitting that the death of Randolph Baldwin occurred as a result of you striking him with the blackjack while you were attempting to rob him?

THE DEFENDANT: Yes.

THE COURT: Is there anything else you want to add?

THE DEFENDANT: No. That's all.

THE COURT: Do you have any questions about your plea of guilty?

THE DEFENDANT: No.

THE COURT: Do you understand what you are doing, Mr. Pace?

THE DEFENDANT: Yes.

THE COURT: Are there any questions that you have, Miss Dunworth?

MS. DUNWORTH: No, I don't, your Honor.

THE COURT: Do you have any further questions of this defendant?

MR. GALLAGHER: No, your Honor.

[66] THE COURT: I am satisfied that the Commonwealth's summary makes out the case that the defendant did, in fact, kill Mr. Baldwin with this blackjack while trying to rob him, which constitutes murder in the second degree.

I am satisfied that he is sorry for it, and I am also satisfied that he did it and he is admitting it.

I am addressing myself in those remarks to the defendant, his counsel and his parents, and I will hear from any of you. If anyone has anything to say about the plea, before I accept the plea, I do contemplate accepting the plea as voluntarily given.

Is there anything you want to say?

(No response).

THE COURT: Are you satisfied, Mr. Clemmons, that the defendant knows what he is doing and committed the crime?

MR. CLEMMONS: Yes. Right.

THE COURT: Are you, Mrs. Clemmons, that he knows what he is doing today and did commit the crime? Are you?

[67] MRS. CLEMMONS: Yes.

THE COURT: I am satisfied that the plea is voluntarily and intelligently made, and the guilty plea may be accepted.

The defendant may be arraigned.

THE CRIER: To this Bill of Information brought by the Commonwealth of Pennsylvania, County of Philadelphia, the District Attorney of Philadelphia County, by this information charges that on or about September 28, 1985, John A. Pace, on Bill of Information number 1275, October session, 1985, charging you with murder in the second degree, what is your plea?

THE DEFENDANT: Guilty.

THE COURT: John A. Pace, on Bill of Information Number 1272, October session, 1985, charging you with possessing instrument of crime generally, to this bill of Information, what is your plea?

THE DEFENDANT: Guilty.

THE CRIER: Your Honor, John A. Pace has pleaded guilty to bill 1275 and bill 1272.

THE COURT: Thank you.

[68] Ordinarily, I would defer sentence and give counsel an opportunity to file motions for a new trial and arrest of judgment and order a pre-sentence and psychiatric.

In this case, however, since it is a guilty plea, since I am satisfied that it is voluntarily given, and since I have no discretion concerning the murder bill, unless there is

an objection from either counsel, it would be the intent of the Court to sentence the defendant at this time.

MS. DUNWORTH: There is no objection on the part of the defense, your Honor.

MR. GALLAGHER: No objection, your Honor.

THE COURT: Is there anything that you want to say before I sentence the defendant or anything you want to present now, recognizing my limitations.

MS. DUNWORTH: Your Honor, I would like to discuss with the Court, be it now or after sentencing, the placement of my client in a facility that would take into account his youth [69] and would generally help to rehabilitate him under whatever supervision is required, your Honor, but I think a place at Camp Hill would be, for the purposes of society at large and for the purposes of my client's interest, which would merge, I think Camp Hill would be a more appropriate place to send my client than a normal adult facility such as Graterford or a similar place closer to home.

THE COURT: Does the Commonwealth have any position regarding that?

MR. GALLAGHER: No, your Honor, I leave that to the discretion of the court as well as the correctional authorities.

MS. DUNWORTH: The Family had particularly asked me to present that request and to ask for the Court's recommendation that he be sent to a facility such as Camp Hill.

THE COURT: Is there anything further you want to present?

MS. DUNWORTH: No, your Honor.

THE COURT: Mr. Gallagher, is there anything you want to present? There is the P.I.C. [70] Bill, which the maximum is two and a half to five.

If there's anything you want to say or any members of the deceased's family that want to say anything, I will hear them.

MR. GALLAGHER: No, your Honor. The only thing is that, I think you are aware of it, because you heard the motion to decertify, but there were some previous juvenile offenses but that really doesn't have any bearing upon the sentence because my understanding, under the law, it is a mandatory sentence but I just point out to the Court that from my further inquiry today, there is an open robbery case in the juvenile court jurisdiction, which I think may be resolved after the Court enters the sentence today, if the Court so enters in accordance with the law.

I want the Court to be aware of that, that there is an open robbery case in juvenile Court.

MS. DUNWORTH: For the purposes of sentence, your Honor, I don't believe that that should affect this Court.

[71] THE COURT: I am satisfied. In any event, it won't affect me except to the extent that it can be disposed of after this sentence.

MS. DUNWORTH: With regard to the P.I.C., I would ask the Court to consider merging with whatever sentence your Honor gives, which is a mandatory sentence.

THE COURT: You are asking that it be concurrent?

MS. DUNWORTH: Yes, sir.

THE COURT: I will consider that as well.

Is there anything you want to say, Mr. Pace?

THE DEFENDANT: Just to tell his family that I am sorry, you know, what happened. That's all.

THE COURT: I am convinced that right now, as you sit before me, you are, but we can't change what happened, and I am bound by law to impose a sentence which is required by the crime that you have pled guilty to.

So the sentence of the Court on [72] Bill of Information October, '85, Number 1275, in which the defendant has pled guilty to murder in the second degree, is life imprisonment.

With respect to the charge of possessing instruments of a crime, the sentence of the Court is not less than one nor more than two years to run concurrent, so that will not be in addition to but can be served at the same time as the sentence of life imprisonment.

With regard to counsel's request, I surely will recommend and make part of the sentencing order that the defendant be confined at Camp Hill or a suitable facility for someone of his age, where he can obtain some help

toward rehabilitation, particularly since he is a young man and at some time in the future, may be subject to release and it is hoped that the prison sentence, for whatever duration it be, certainly aid him in rehabilitating him.

The reasons for the sentence are they are mandated by law. I don't know that there's anything else that the Court can say.

You have ten days to file a [73] petition to reconsider. I will not reconsider.

You have 30 days to appeal to the Superior Court. Miss Dunworth, if the appeal under some of the limited grounds are warranted, you are directed, as court appointed counsel, to pursue that matter.

Is there anything else anybody wants to say?

MR. GALLAGHER: Your Honor, so the record is clear, the defendant does have and counsel on his behalf, has ten days to withdraw the guilty plea and/or ask the Court to reconsider.

As the Court has already indicated, there is really no leeway for the Court to reconsider because the sentence is mandated by the crime to which the defendant has pled guilty.

THE COURT: I think he has ten days in which he can ask me to withdraw the guilty plea. I think that's correct.

MR. GALLAGHER: Do you understand that, Mr. Pace?

THE DEFENDANT: I understand.

[74] THE COURT: The sentence has been imposed.

If there's nothing further, we will recess this case.

MR. GALLAGHER: Your Honor, so the record is complete, the Commonwealth would move at this point to nol pros bills 1274 and 1273, the reason being that the sentences would merge if the defendant had pled guilty on all the bills, and that is the purpose for the Commonwealth's motion for nol prossing those two bills.

THE COURT: Also, I think the second count of 1272, which is P.I.C. Weapon, ought to be nol prossed.

MR. GALLAGHER: Yes, sir.

THE COURT: Thank you very much.

MR. GALLAGHER: Thank you, your Honor.

Judge, I ask that the blackjack be returned to the police evidence room.

THE COURT: It may be returned there.

- - -

[75] (Whereupon, the hearing was concluded).

- - -

PETITION UNDER
POST CONVICTION HEARING ACT

COMMONWEALTH OF PENNSYLVANIA	COURT AND DOCKET NUMBERS
VS	Cp# 1275

Mr. John Pace
(Name of Petitioner) To be filled in by Clerk by Court

NOTE: List below those informations or indictments & offenses for which you have not completed your sentence.

INFORMATION OR INDICTMENT NUMBERS:

CP #1275

85-10-1272

I WAS CHARGED WITH THE FOLLOWING CRIMES:

Homocide Robbery.

1. MY NAME IS:

   Mr. John Pace

2. I AM NOW

   (A) ☐ On Parole (B) ☐ On Probation
   (C) ☒ Confined in SCI. Camp Hill, Pa.

3. I WAS SENTENCED ON February 13, 19 86 TO A TOTAL TERM OF Life, COMMENCING ON September 30, 19 85, FOLLOWING A

   ☐ Trial by Jury

   ☐ Trial by a judge without a jury

   ☒ Plea of guilty

   ☐ Plea of nolo contendere

4. I AN ELIGIBLE FOR RELIEF BECAUSE OF:

* * *

☒ The introduction of a coerced confession into evidence

* * *

☒ The infringement of my privilege against self-incrimination under either federal or state law

☒ The denial of my constitutional right to representation by a competent lawyer

☒ A plea of guilty unlawfully induced

* * *

5. THE FACTS IN SUPPORT OF THE ALLEGED ERROR(S) UPON WHICH THIS PETITION IS BASED ARE AS FOLLOWS: (State facts clearly and fully; argument, citations, or discussions of authorities shall not be included.)

(A) I know the following facts to be true of my own personal knowledge:

In this particular case I was represented by incompetent counselor, and I was induced by counselor to plead guilty, without having the full understanding of my constitutional rights. And what they entailed. I also was induced at the Police Administration Bldg, with respect to giving a confession. Amd was not abreast of my Fifth Amendment right. Of the Constitution of the United States.

(B) The following facts were made known to me by means other than my own personal knowledge (Explain how and by whom you are informed):

Doing reasearch in the prison law clinic, and personal reading.

(C) In the event my appeal is allowed as requested under #4, the following are the matters which I intend to assert on that appeal (Specify the matters to be asserted if appeal is allowed)

The introduction of a coerced confession into evidence. The infringement of my privilege against self incrimination under either federal or State law.

The denial of my constitutional right to representation by competent lawyer. A plead of guilty unlawfully induced.

6. SUPPORTING EXHIBITS

(A) In support of this petition I have attached as exhibits:

☐ Affidavits [Exhibit(s) No._____]

☐ Records [Exhibit(s) No._____]

☐ Other Supporting Evidence [Exhibit(s) No._____]

(B) I have not attached any affidavits, records or other supporting evidence because

I do not have any in my possession.

7. I HAVE TAKEN THE FOLLOWING ACTION(S) TO SECURE RELIEF FROM MY CONVICTION(S) OR SENTENCE(S):

(A) Direct Appeal (If "YES," name the court(s) to which appeal(s) was/were taken, date, term and number, and result.)

☐ YES ☒ NO

(B) Previous proceedings in the courts of the Commonwealth of Pennsylvania (If "YES," name the type of proceedings (such as habeas corpus, etc.) – including former proceedings under the Post Conviction Hearing Act the Court(s) in which petition(s) was/were filed, date, term and number, and result, including all appeals.)

☐ YES ☒ NO

(C) Habeas Corpus or other petitions in Federal Courts (If "YES," name the district in which petition(s) was/were filed, date(s), Court Number – civil action or miscellaneous, and result including all appeals.)

☐ YES ☒ NO

(D) Other legal proceedings (If "YES," give complete details – type of action, court in which filed, date, term and number, and result, including all appeals.)

☐ YES ☒ NO

8. FOLLOWING MY ARREST, I WAS REPRESENTED BY THE FOLLOWING LAWYER(S): (Give the lawyer's name and the proceeding at which he represented you.)

I have no knowledge of who she was, all I know is that she represented my case from the beganing to the end, and that was the plead of guilty.

9. THE ISSUES WHICH I HAVE RAISED IN THIS PETITION HAVE NOT BEEN FINALLY LITIGATED OR WAIVED BECAUSE: (State facts.)

Prior to this petition being filed I had no knowledge of the law, so therefore I did not know what to file. Now that I have presented some law to the courts I hope these matters can be litigated.

10. BECAUSE OF THE FOREGOING REASONS, THE RELIEF WHICH I DESIRE IS:

(A) ☐ Release from custody and discharge

(B) ☒ A new trial

(C) ☐ Correction of sentence

(D) ☐ Other relief (specify): _____

11. (A) I am ☐ ABLE ☒ NOT ABLE to pay the costs of this proceeding

I have $__0__ in my prison account.

(B) My other financial resources are: Parents

12. (A) ☒ I do not have a lawyer and I am without financial resources or otherwise unable to obtain a lawyer.

(1) ☒ I request the court to appoint a lawyer to represent me.

(2) ☐ I do not want a lawyer to represent me.

(B) ☐ I am represented by a lawyer. (Give name and address of your lawyer)

/s/ John A. Pace
(Signature of Petitioner)

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
: SS
COUNTY OF CUMBERLAND :

Personally appeared before me a notary public in and for said County and Commonwealth

/s/ John A Pace
(Name of Petitioner)

who, being duly sworn [or affirmed] according to law, deposes and says:

That he is the petitioner herein and the facts as set forth in this petition are true and correct to the best of his knowledge, information and belief.

/s/ John A. Pace
(Signature of Petitioner)

Sworn to and subscribed before me this

5th day of August, 1986

/s/ Steven G. Wetzler
(Notary Public)

Steven G. Wetzler Notary Public Lower Allen Twp. Cumberland Co. My Expiration Expires Apr. 10, 1989

COMMONWEALTH OF PENNSYLVANIA VS	IN THE CRIMINAL COURTS OF THE COUNTY OF
(Name of Petitioner)	Criminal Action No. _____ of ____ 19____

ORDER

AND NOW this _____ day of _____, 19_____
Upon consideration of the foregoing petition:

1. ☐ Petition is returned to petitioner for amendment as follows, such amendment to be made on or before _____, 19_____

2. ☐ A rule is granted upon the Commonwealth of Pennsylvania to show cause why a hearing should not be granted. The rule is returnable on or before _____, 19_____

3. ☐ The request to proceed as a poor person, without the payment of costs, is ☐ granted ☐ denied.

4. ☐ Upon finding that petitioner is unable to obtain a lawyer _____ Esq., is appointed to represent him.

5. ☐ The Clerk of this Court is ordered and directed to do the following forthwith:

(a) To serve a copy of this petition and this order upon the District Attorney of _____ County.

(b) To send a copy of this petition and this order to _____ Esq., the lawyer for the petitioner.

(c) To send a copy of this order to the petitioner.

6. ☐ _____ J.

_____

FRANKLIN D. GREEN, Esquire Attorney for Petitioner
Identification No. 15146
933 East Wadsworth Avenue
Philadelphia, Pa. 19150
(215) 242-1531

IN THE COURT OF COMMON PLEAS
FOR PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: CRIMINAL TRIAL DIVISION
-vs-	: OCTOBER TERM, 1985
JOHN A. PACE	: NO. 1272, MURDER

AMENDED PETITION UNDER
POST CONVICTION HEARING ACT

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

Your petitioner, JOHN A. PACE, by his attorney, files this Amended Petition in conformance with the Post Conviction Hearing Act: 19 P.S. § 1180-1 et seq.; and in support thereof, states as follows:

1. Petitioner had a Decertification Hearing before the Honorable David N. Savitt on February 13, 1986 in Courtroom 602, City Hall, Philadelphia, Pennsylvania.

2. Following the Court's denial of the Motion to Decertify, petitioner, also on February 13, 1986, entered into a plea of guilty to murder in the second degree and was sentenced to life imprisonment by Judge Savitt.

3. Petitioner has filed a Petition under the Post Conviction Hearing Act to secure relief from conviction and sentencing.

4. Petitioner is presently incarcerated in the State Correctional Institution at Camp Hill, Pennsylvania.

5. On or about August 21, 1986, petitioner filed a Petition under the Post Conviction Hearing Act, alleging:

(a) Ineffective assistance of counsel.

(b) The abridgement of rights guaranteed by the Constitution or laws of this Commonwealth, or by the Constitution of the United States, being rights not afforded petitioner at the time of his trial.

6. That in support of this Amended Petition, petitioner believes and therefore avers that:

(a) Moira Dunworth, Esquire, Trial Counsel for petitioner did not render effective of counsel in that:

(I) Trial Counsel failed to seek a suppression of my alleged confession.

(II) Trial Counsel failed to fully explain to me the effect of my pleading guilty to murder in the second degree.

WHEREFORE, your petitioner prays that the Honorable Court grant leave for the presentation of testimony in this matter and those raised in petitioner's original petition, upon receipt thereof, grant petitioner relief in accordance with the Post Conviction Hearing Act, to wit: Grant petitioner a new trial.

/s/ Franklin D. Green
FRANKLIN D. GREEN

VERIFICATION

I, FRANKLIN D. GREEN, Esquire, hereby state:

1. I am the attorney for JOHN A. PACE, petitioner in the attached Amended Petition Under Post Conviction Hearing Act.

2. I verify that the statements made in the foregoing pleading are true and correct to the best of my knowledge, information and belief; and

3. I understand that the statements made herein are subject to the penalties of 18 Pa.C.S.Sec. 4904 relating to unsworn falsification to authorities.

/s/ Franklin D. Green
FRANKLIN D. GREEN, Esquire

Date March 11, 1987

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION, CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	OCTOBER TERM, 1985
V.	:	
JOHN PACE	:	NO. 1272 (P.C.H.A.)

COMMONWEALTH'S MOTION TO DISMISS
OR COMPEL SPECIFIC PLEADING OF
DEFENDANT'S P.C.H.A. PETITION

TO THE HONORABLE, THE JUDGE OF THE SAID COURT:

RONALD D. CASTILLE, District Attorney of Philadelphia County, by his Assistant, RICHARD E. MILLER, Motions Unit, in support of the Commonwealth's Motion to Dismiss or Compel Specific Pleading of defendant's petition under the Post Conviction Hearing Act (hereinafter P.C.H.A.), respectfully represents the following:

I. STATEMENT OF THE CASE

1. On February 13, 1986, defendant pled guilty to second degree murder. He was sentenced to life imprisonment.

2. Defendant has filed an amended P.C.H.A. petition, alleging the following claims for relief:

a) Trial counsel was ineffective for failing to "fully explain" to defendant the effect of pleading guilty to second degree murder.

b) Trial counsel was ineffective for failing to move to suppress defendant's confession.

3. By way of an answer, the Commonwealth denies that trial counsel was ineffective in the manner alleged.

II. MOTION TO DISMISS OR COMPEL SPECIFIC PLEADING

Both of defendant's claims are bald assertio unsupported by any factual allegations. Absent specific pleading, defendant's petition must be dismissed. *Commonwealth v. Pettus,* 424 A.2d 1332 (Pa. 1981).

Defendant's guilty plea claim (claim "a") is refuted by the record. He was colloquied before entering his plea and he indicated that he fully understood what he was doing. *See* N.T. 2/13/86 at pp. 30-46. Defendant's claim is clearly refuted by the record and must be dismissed. *Commonwealth v. Cappelli,* 489 A.2d 813 (Pa. Super. 1985).

Defendant's suppression claim (claim "b") is not legally cognizable. *See Commonwealth v. Casner,* 461 A.2d 324 (Pa. Super. 1983) (where defendant pleads guilty, P.C.H.A. issues are very limited). Defendant's suppression claim does not fall into the category of cognizable "guilty plea claims." Therefore, it must be dismissed.

WHEREFORE, the Commonwealth requests this Court to dismiss defendant's petition under the Post Conviction Hearing Act and order specific pleading of those claims not dismissed.

Respectfully submitted,

RONALD D. CASTILLE
District Attorney

By: /s/ Richard E. Miller
RICHARD E. MILLER
Assistant District Attorney
Motions Unit

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION, CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	OCTOBER TERM, 1985
V.	:	
JOHN PACE	:	NO. 1272 (P.C.H.A.)

ORDER

AND NOW, this ___ day of ___, 1987, upon consideration of the Commonwealth's Motion to Dismiss or Compel Specific Pleading, defendant shall be required to specifically plead the following allegations.

1. Specify how defendant was prejudiced by counsel's failure to move to suppress his confession and how counsel was ineffective in this manner.

2. Specify how counsel was ineffective in explaining to defendant the effect of pleading guilty to murder and how defendant was prejudiced.

Failure to comply with this Order within ten (10) days will result in dismissal of defendant's Post Conviction Hearing Act petition.

BY THE COURT:

/s/ O'Keefe
J.

FRANKLIN D. GREEN, Esquire Attorney for Petitioner
Identification No. 15146
933 East Wadsworth Avenue
Philadelphia, Pennsylvania 19150
(215) 242-1531

COMMONWEALTH OF PENNSYLVANIA	:	COURT OF COMMON PLEAS
-vs-	:	PHILADELPHIA COUNTY OCTOBER TERM, 1985
JOHN A. PACE	:	NO. 1272 (P.C.H.A.)

ANSWER TO COMMONWEALTH'S MOTION TO DISMISS

1. But for the confession the case against John Pace, petitioner above, was weak at best, petitioner was a minor at the time of the incident and was also intoxicated.

Here a statement was taken from petitioner by the police in violation of Mr. Pace's rights as a minor under Pennsylvania law.

Further, petitioner, because of his intoxicated state, was incapable of giving a voluntary, intelligent and knowing statement to the police. This could have been confirmed by the results of the blood test taken at the YSC on or about September 18, 1985.

2. Petitioner feels trial counsel did not make clear to him that by his pleading guilty to second degree murder he would receive a mandated sentence of life imprisonment but instead implied that the sentence could be less than life imprisonment and probably would be.

Respectfully submitted,

/s/ Franklin D. Green
FRANKLIN D. GREEN

VERIFICATION

I, FRANKLIN D. GREEN, Esquire, hereby state:

1. I am the attorney for JOHN PACE, Petitioner in the foregoing Answer to Commonwealth's Motion to Dismiss.

2. I verify that the statements made in the foregoing pleading are true and correct to the best of my knowledge, information and belief; and

3. I understand that the statements made herein are subject to the penalties of 18 Pa.C.S.Sec. 4904 relating to unsworn falsification to authorities.

/s/ Franklin D. Green
FRANKLIN D. GREEN, Esquire

Date January 3, 1988

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL MOTIONS DIVISION

- - -

COMMONWEALTH	:	OCTOBER TERM, 1985
-vs-	:	
JOHN A. PACE	:	NO. 1272

- - -

PCHA

MOTION TO DISMISS

- - -

January 11, 1988

Courtroom 788, City Hall

Philadelphia, Pennsylvania

- - -

BEFORE: THE HONORABLE JOSEPH D. O'KEEFE, J.

- - -

APPEARANCES:

PETER KENNEDY, ESQUIRE
Assistant District Attorney
For the Commonwealth

FRANKLIN D. GREEN, ESQUIRE
Court-Appointed Attorney
For The Petitioner

[1] THE COURT CRIER: Number 6, Your Honor, John Pace.

THE COURT: They are going to argue their motion now.

MR. GREEN: Okay.

MR. KENNEDY: Your Honor, on February 13, 1986, the defendant John Pace pled guilty to second degree murder before Judge David Savitt. Judge Savitt accepted the plea after a full colloquy and Sentenced the defendant to life imprisonment.

On March 31st of 1987 the defendant filed an amended petition alleging that counsel Moira Dunworth was ineffective for two grounds.

THE COURT: What was the date?

MR. KENNEDY: March 31st, 1987, the amended petition.

Again, counsel was ineffective is the allegation for – on two grounds, that counsel at the time of the plea colloquy was Moira Dunworth.

Now the first basis for trial counsel's ineffectiveness was counsel failed to seek suppression of the defendant's statement or confession after he was arrested. Now the basis of the Commonwealth's motion to dismiss is that at the plea colloquy on page 39, the notes of testimony, [2] the defendant expressly waived his right to suppress evidence including his statement to the police during the colloquy. So that claim, Your Honor, is waived by defendant.

The second basis for ineffectiveness was counsel failed to explain to Mr. Pace the effect, the full effect of pleading guilty. Now more specifically Mr. Green in his supplemental petition alleges that counsel did not make clear to her

client that defendant would receive a mandatory life imprisonment sentence if the judge accepted the plea agreement. I would refer Your Honor to page 43 of the notes of testimony where the Court states, "If I find you guilty or if I accept the plea to second degree murder you must know that the sentence is life imprisonment.

The Court further states, "I will have no discretion to sentence you to less than that. Do you understand that?"

The defendant answers yes. So that claim is refuted by the record, Your Honor. I would ask Your Honor to therefore not order an evidentiary hearing and order the amended petition be denied. Thank you.

THE COURT: Do you want to rest on the record [3] or –

MR. GREEN: No, Your Honor, I would like to further clarify the first point, and that is that this whole case was based, the petitioner feels that this whole case rests on whether or not the alleged confession was suppressed or not. That was the Commonwealth's case. And the failure to even seek a suppression caused the guilty plea to come up and that the defendant/petitioner did not intelligently, knowingly and voluntarily plead guilty because he did not know at that time the effect of waiving his right to a suppression hearing, which was the whole case. He was under 18 at the time, there was no proper waiver of that right. He was intoxicated on drugs and/or alcohol at the time. There are facts that exist that would tend to indicate had suppression been sought it would have been a successful suppression.

THE COURT: I understand the issues, Mr. Green. I will hold this under advisement.

MR. KENNEDY: Thank you, Your Honor. I would move the Quarter Sessions file into evidence.

THE COURT: All right, thank you.

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct transcript of the same.

/s/ [Illegible]
Official Stenographer

Feb. 9, 1988
DATE

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

_____
Judge

[LOGO] DISTRICT ATTORNEY'S OFFICE
1421 Arch Street
PHILADELPHIA, PENNSYLVANIA 19102

RONALD D. CASTILLE
DISTRICT ATTORNEY

January 29, 1988

Honorable Joseph D. O'Keefe
532 City Hall
Philadelphia, Pennsylvania 19107

Re: Commonwealth v. John Pace
C.P. 85-10-1272-75 (P.C.H.A.)

Dear Judge O'Keefe:

On January 11, 1988, the Commonwealth requested the Court to deny P.C.H.A. relief in the above-captioned case without proceeding to an evidentiary hearing. The matter was held under advisement. Since defendant's answer to the Court's order of more specific pleadings was not received until January 11, 1988, the day the motion was heard, the Commonwealth takes this opportunity to clarify its position.

Defendant has alleged that counsel, Moira Dunworth, Esquire, rendered ineffective assistance of counsel and, in support, points out that counsel failed to seek suppression of a confession before advising her client to plead guilty. In *Commonwealth v. Marsh,* 333 A.2d 181 (Pa. 1975), the Supreme Court of Pennsylvania held that a petitioner who has pled guilty must allege three things before relief under the Post Conviction Hearing Act should even be considered: (1) the existence of constitutionally infirm evidence; (2) the guilty plea was motivated by the same evidence; and (3) on what grounds the evidence would have been suppressed. *Id.* at 182. Although defendant has alleged in his supplemental petition that a statement given to the

police on September 18, 1985 was involuntarily given, the record demonstrates that defendant gave a second statement after the victim died which was just as damaging as the first.

On September 30, 1985, defendant corroborated his earlier confession, reiterating that it was his intent to rob the victim. N.T. 2/13/86, pp. 48, 58. Defendant also explained to Judge Savitt during the colloquy that it was his clear intent to rob the victim. *Id.* pp. 64-65. The record makes clear that the evidence against defendant, even excluding the first confession, was overwhelming and, therefore, defendant cannot reasonably maintain now that his plea was involuntary. Under *Marsh,* relief should be denied.

Thank you for your further consideration of this matter.

Very respectfully yours,

/s/ Peter C. Kennedy
PETER C. KENNEDY
Assistant District Attorney
Motions Unit

PCK:ec

cc Franklin D. Green, Esquire
P.C.H.A. Unit

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	OCTOBER TERM, 1985
VS.	:	
JOHN PACE	:	NO. 1272

ORDER

O'KEEFE, J.

AND NOW TO WIT, this 25th day of July, 1988 it is hereby *ORDERED AND DECREED* that the Commonwealth's Motion to Dismiss the defendant's Petition for Relief under the Post Conviction Hearing Act is *DENIED.*

It is further *ORDERED AND DECREED* that an evidentiary hearing be conducted on November 15, 1988 to address the claims raised in the defendant's Amended Petition for Relief.

BY THE COURT:

/s/ O'Keefe
J.

DAVID RUDENSTEIN
ATTORNEY AT LAW
ATTY. I. D. 33023
~~3140 PSFS BUILDING~~
~~12 S. 12TH ST.~~
~~PHILADELPHIA, PA 19107~~
~~(215) 928-1155~~

ATTORNEY FOR DEFENDANT
SUITE 1100
1420 WALNUT STREET
PHILADELPHIA, PA 19102
(215) 790-9422

Plaintiff COMMONWEALTH OF PENNSYLVANIA *vs.* *Defendant* JOHN PACE	COURT OF COMMON PLEAS OF PHILADELPHIA CRIMINAL TRIAL DIVISION ~~*Docket No.*~~ October Term, 1985 No. 1272 ~~*CIVIL*~~ *ACTION* CRIMINAL

AMENDED P.C.R.A. PETITION

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

The defendant, John Pace, by and through his court appointed attorney, David Rudenstein, hereby files this amended petition in accordance with the Post Conviction Relief Act and, in support of same, states:

1. The defendant, having previously been charged with murder and related offenses was assigned to Judge Savitt for trial on or about February 13, 1986. At that time, the defendant entered a plea to murder in the second degree and thereafter, and on that same date, was sentenced to mandatory life in prison.

2. At trial, the defendant was represented by Moira Dunworth, Esquire.

3. No direct appeal was taken.

4. On or about August 21, 1986, the defendant filed a petition under the Post Convicition Hearing Act. Thereafter, apparently, Franklin D. Green, Esquire was appointed to represent Mr. Pace in this matter. Apparently, said counsel filed an amended petition on March 31, 1987 alleging that trial counsel was ineffective on two grounds. To wit that she failed to seek suppression of defendant's statement and that she failed to fully explain the effect of pleading guilty.

5. Thereafter, a motion to dismiss hearing was held in P.C.H.A. Court, room 788, City Hall on January 11, 1988 before the Honorable Joseph D. O'Keefe. At that time, this matter was taken under advisement and the Court file does not reflect any decision.

6. Subsequently, and frankly, for reasons not totally known to this counsel, I was appointed to represent Mr. Pace.

7. The defendant was denied his rights to due process and to a fair trial under the United States Constitution and the Pennsylvania Constitution to such an extent as to make his court proceedings fundamentally unfair, requiring a new trial and, more specifically, the defendant's constitutional rights were violated as he was without effective assistance of counsel at the trial level and, more specifically:

a. Trial counsel was ineffective for failing to properly present reasons in support of her pretrial application to remand this matter to family court. On February 13, 1986, at page 9 of the transcript, the Court informed counsel that once a prima facie case of murder was shown, the

criminal court has exclusive jurisdiction and the burden is on the defendant to show that his case does not belong in criminal court. The Court gave trial counsel an opportunity to produce more evidence, but, she indicated that she had no such evidence. Trial counsel failed to produce any psychological evaluation and failed to produce testimony from the defendant or his family. In that the defendant had no prior convictions and in that he had a good school report from the Youth Study Center, the psychological evaluation could have demonstrated that he was well adjusted and perhaps could have concentrated on the aberrant behavior, to wit, the crime in question.

b. Trial counsel was ineffective for failing to insist that pre-trial motions to suppress defendant's out-of-court statements be held prior to the time any guilty plea was entered. Defendant gave two statements, the first of which was inculpatory and which was given within several hours of his actual arrest. At page 8 of the transcript, it is indicated that, at the time of the arrest, defendant was intoxicated and presumeably was intoxicated at the time he gave his initial inculpatory statement. The second statement, which was taken 12 days later would be fruit of the poisonous tree and equally suppressible. In that the defendant was a minor; in that he had no prior criminal record and in that there were no arguable aggravating factors, this was not a death penalty case and, hence, the defendant had absolutely nothing to lose by having litigated his pre-trial motions first. The sentence for first degree and second degree murder would have been the same, to wit, mandatory life in prison and, in effect, the defendant received absolutely nothing

in exchange for his guilty plea. Competent counsel could never have suggested this course of action when, in fact, the initial culpatory statement was taken while the defendant was intoxicated.

c. Trial counsel was ineffective for failing to fully explain the ramifications of the guilty plea to defendant. It is true that Judge Savitt, at page 43, indicated to the defendant that he had no discretion and that the sentence was mandatory life. However, the Judge later, at page 72, made certain remarks to the defendant which certainly would have left any reasonable person and, certainly, a 17 year old in serious doubt as to the consequences of his plea. The Court said:

> "With regard to counsel's request, I surely will recommend and make part of the sentencing Order that the defendant be confined at Camp Hill or a suitable facility for someone of his age, where he can obtain some help toward *rehabilitation*, particularly since he is a young man and, at *some time in the future, may be subject to release* and it is hoped that the prison sentence, for *whatever duration it be*, certainly aid in rehabilitating him" (my emphasis).

No where on the record did Judge Savitt or defendant's attorney explain that the Judge was in error when he indicated that the defendant might be subject to release, as Pennsylvania has no good time credits and, further, a life sentence is life in Pennsylvania unless a governor would issue a pardon. Any reasonable person and, certainly a 17 year old with no prior record, would have taken the Judge's comments to mean that, although he was receiving a life sentence, he

could be parolled in the future. This, as we all know, is not true and it was patently ineffective of his counsel to have not pointed this out to defendant. The Court can take judicial notice of the fact that the media – more the national than the local media – is always complaining about life sentences not being life sentences and many people, even in this Commonwealth, believe, mistakenly, that someone who commits a murder and pleads to a life sentence can be and will be parolled.

d. The defendant received ineffective assistance of counsel in that defense counsel should have advised defendant not to plead guilty to second degree murder. As indicated above, the obvious sentence on a first degree murder charge would have been life imprisonment. The sentence was the same for second. Obviously, trial counsel felt that she had a viable defense to second degree murder. At page 15-16 of the transcript, trial counsel said:

> "Mr. Baldwin (victim) apparently said something to my client, such as 'What are you doing?', or something to that effect. My client said 'What do you mean?'. He said, 'I know what you're up to'; that is Mr. Baldwin.
>
> Mr. Baldwin, according to the statement, reached out to my client. My client had a blackjack in his pocket.
>
> He hit Mr. Baldwin with the blackjack. He did not rob Mr. Baldwin. There is certainly an intimation that my client may have contiplated that, at least

> according to the statements. There were two statements.
>
> My client walked away from Mr. Baldwin and, apparently, there was an officer who was in a patrol car, Officer Little, who witnessed the latter part of the incident.
>
> I think it significant, Your Honor, that the officer indicated in the statement that he gave subsequent to this, to the arrest of my client for murder, that it looked to him like a fist fight was insuing, so it's a very ticklish question as to when the intent to rob occurred."

It is obvious from trial counsel's own mouth that she believed that she had a viable defense to the charge of murder two. Obviously there was no getting around murder three, but the sentence for murder three would have been substantially less than the sentence for murder two. Moreover, this counsel would assert that we have to be practical in analyzing counsel's actions and, in the City of Philadelphia, most experienced criminal practitioners know that their client, and certainly a client in these circumstances would never have received a death penalty from a judge sitting alone, such as Judge Savitt, and furthermore, an experienced trial practitioner would have known that they at least had a shot of coming in with a third degree in front of a judge like Judge Savitt who everyone knows has "reasonable doubt" and who is a judge that many attorneys will waive a jury in front of for that reason.

The actions or inactions of trial counsel certainly mandate a new trial for ineffectiveness as set down in *United States vs. Strickland* and *Commonwealth vs. Maroney.*

Counsel, at this time has chosen to file this amended petition as some degree of time has passed since accepting the appointment. However, the defendant has been incarcerated at Camp Hill, and because of the recent problems there, counsel has been unable to visit with defendant. Counsel respectfully requests leave of Court to supplement this amended petition after he has had a reasonable opportunity to confer with his client. A "bring down" is scheduled for December 18, 1989.

Respectfully submitted by:

/s/ David S. Rudenstein
David S. Rudenstein, Esquire,
Attorney for defendant

[Dated 11/29/89]

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION, CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	OCTOBER TERM, 1985
v.	:	
JOHN PACE	:	NOS. 1272-1275 (P.C.R.A.)

COMMONWEALTH'S MOTION TO DISMISS

TO THE HONORABLE, THE JUDGE OF THE SAID COURT:

RONALD D. CASTILLE, District Attorney of Philadelphia County, by his Assistant, NEIL T. MURRAY, respectfully represents:

1. Defendant in the above-captioned case entered a guilty plea to Murder in the Second Degree and Possessing an Instrument of Crime before the Honorable David N. Savitt on February 13, 1986. Judge Savitt sentenced defendant to life imprisonment.

2. Moira Dunworth, Esquire represented defendant at the guilty plea and sentencing.

3. Defendant took no direct appeal.

4. Defendant received new counsel, Franklin Green, Esquire, and filed his first petition for relief under the Post Conviction Hearing Act. On January 11, 1988, the Honorable Joseph D. O'Keefe held the Commonwealth's motion to dismiss under advisement. Without explanation, there has been no ruling on this motion.

5. Defendant now has new counsel and has filed a second petition for relief under the Post Conviction Hearing Act alleging ineffective representation by trial counsel. Counsel is presumed effective. To warrant relief, defendant must demonstrate that counsel's ineffectiveness worked to his prejudice. *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987). Counsel will not be considered ineffective for failing to assert a meritless claim. *Commonwealth v. Unger*, 494 Pa. 592, 598, 432 A.2d 146, 149 (1980); *Commonwealth v. McGeth*, 347 Pa. Super. 333, 346, 500 A.2d 860, 862 (1985). The Supreme Court has held that claims made in a vacuum cannot be supported, cannot provide grounds for relief and must be dismissed. *Commonwealth v. Silo*, 509 Pa. 406, 502 A.2d 173, 176 (1985); *Commonwealth v. Pettus*, 492 Pa. 558, 563, 424 A.2d 1332, 1335 (1981). At the very minimum, defendant's claims; fail to conform to the specificity requirements of the Post Conviction Hearing Act.

Defendant initially alleges counsel ineffective for failing to offer additional evidence at the decertification hearing to have defendant tried as a juvenile. This claim is not cognizable under the Post Conviction Hearing Act, 42 Pa. Cons. Stat. Ann. §9543(3). A claim is not cognizable under the Post Conviction Hearing Act unless it is of constitutional dimension. *Commonwealth v. Betrand*, 484 Pa. 511, 523, 399 A.2d 682 (1979). In the instant case, defendant is not challenging his conviction nor his sentence under due process grounds. Moreover, when a defendant enters a guilty plea, the only legally cognizable issues in a post conviction proceeding are those which affect either the voluntariness of the plea or the legality of the sentence. *Commonwealth v. Casner*, 315 Pa. Super. 12, 461 A.2d 324 (1983); *Commonwealth v. Edrington*, 317 Pa.

Super. 545, 464 A.2d 456 (1983). Pre-trial procedural error is not cognizable on appeal from a plea of guilty in absence of any allegation that the plea was thereby rendered involuntary. *Commonwealth v. Chumley*, 482 Pa. 626, 394 A.2d 497 (1978), *cert. denied*, 440 U.S. 966, 99 Super. Ct. 1515 (1979). Therefore, this claim must be dismissed.

Defendant next claims counsel ineffective for failing to file a motion to suppress defendant's statements. When a defendant enters a guilty plea, the only legally cognizable issues in a post conviction proceeding are those which affect either the voluntariness of the plea or the legality of the sentence. *Commonwealth v. Casner*, *supra*; *Commonwealth v. Edrington*, *supra*. As defendant is not attacking the voluntariness of his plea, or the legality of his sentence, this claim has no merit. During the guilty plea, defendant stated he knew he was giving up his right to suppress his statements (N.T. 2/13/86, p. 40). A challenge to the admissibility of a statement is not appealable from a guilty plea. *Commonwealth v. Faust*, 324 Pa. Super. 492, 471 A.2d 1263 (1984). Therefore, this claim must be dismissed.

Defendant next claims counsel ineffective for failing to explain that a plea to second degree murder involves a mandatory life imprisonment sentence. This claim is without merit. Judge Savitt explained to defendant that by accepting a guilty plea to murder in the second degree, defendant had to be sentenced to no less than life imprisonment (N.T. 2/13/86, pp. 43-44, 45). The court stressed that it had no discretion to sentence defendant to anything less than life imprisonment (*Id.*). When a claim is directly refuted by the record this Court may dismiss the claim without an evidentiary hearing. *Commonwealth v. Cappelli*, 340 Pa. Super. 9, 489 A.2d 813, 818 (1985); *Commonwealth*

v. Brown, 242 Pa. Super. 240, 363 A.2d 1249 (1976). Therefore this claim must be dismissed.

Defendant finally claims counsel ineffective for advising defendant to plead guilty to murder in the second degree when defendant had a viable defense to murder in the second degree. Defendant unequivocally stated during the plea that he killed the victim while attempting to rob him (N.T. 2/13/86, p. 65). Since the killing did not amount to manslaughter, trial counsel had no choice but to plead defendant to murder in the second degree. Defendant's mere speculation that if a trial were conducted, defendant would have been found guilty of murder in the third degree is meritless. As defendant has not shown that he was prejudiced by counsel's actions, this claim must be dismissed. *Commonwealth v. Pierce*, *supra*.

WHEREFORE, the Commonwealth respectfully requests that this Court dismiss defendant's petition without an evidentiary hearing.

Respectfully submitted,

RONALD D. CASTILLE,
District Attorney

BY: _____
NEIL T. MURRAY,
Assistant District Attorney
Motions Unit

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY

TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	OCTOBER TERM, 1985
vs.	:	
JOHN A. PACE	:	NOS. 1272-1275

ORDER

AND NOW, TO WIT this 23RD day of JULY, 1991, it is hereby *ORDERED AND DECREED* that the Commonwealth's Motion to Dismiss the Defendant's Petition for Relief under the Post Conviction Hearing/Relief Act is *GRANTED* and the Defendant's Petition is *DISMISSED*.

BY THE COURT:

/s/ [Illegible]
J.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	OCTOBER TERM, 1985
	:	NOS. 1272-1275
v.	:	AUGUST 22, 1991
JOHN PACE	:	
MCCRUDDEN, J.	:	

OPINION

Following an evidentiary hearing at which time defendant testified, the Motion to Dismiss the Defendant's Petition for Post Conviction Relief was granted and the petition was dismissed on July 23, 1991.

In essence, defendant's petition avers that the life imprisonment sentence imposed following defendant's guilty plea to second degree murder warrants defendant to retract his guilty plea. In support thereof, defendant testified *inter alia*, that he was lulled into pleading guilty by the mistaken belief that he would be eligible for parole at some point in the future. We disagree.

During the March 26, 1991 hearing before this court, the applicable portions of the guilty plea colloquy were read into the record of the matter at bar. In no less than three (3) instances, defendant was advised that the mandatory sentence for second degree murder is life imprisonment. In each instance, defendant, who stated before this court that he read, writes and understands the English language, advised the sentencing court that he fully understood the impact of the guilty plea and that the plea was voluntary. As the courts of this Commonwealth have held, claims directly refuted by the trial court record

do not warrant post conviction relief. *COMMONWEALTH V. CAPPELLI*, 340 Pa. Super. 9, 489 A.2d 813 (1985).

Defendant also seeks relief based upon the unsupported allegations that his trial counsel was ineffective in failing to file a motion to suppress defendant's statements to the police, and further, that his trial counsel should have offered additional evidence of an unspecified type during the juvenile decertification hearing. We hold, however, that neither claim is cognizable since the only issues in a post conviction action following a guilty plea are those matters which may effect the voluntariness of the guilty plea or the legality of the sentence. *See COMMONWEALTH V. CASNER*, 315 Pa. Super. 12, 461 A.2d 324 (1983). Neither situation is present in the matter at bar.

BY THE COURT,

/s/ [Illegible]
J.

IN THE
SUPERIOR COURT OF PENNSYLVANIA
Sitting at Philadelphia

COMMONWEALTH OF PENNSYLVANIA,

Appellee

vs.

JOHN PACE,

Appellant

Philadelphia 1991

No. 02429

BRIEF FOR APPELLANT

Appeal from the ORDER OF The Honorable James D. McCrudden, filed July 23, 1991, in the Court of Common Pleas, Criminal Trial Division, which dismissed appellant's P.C.R.A. Petition on October Term, 1985, Bills of Information No. 1272.

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STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Court pursuant to 42 Pa. C.S.A. Section 742.

ORDER IN QUESTION

The Order of Judgment of The Honorable James D. McCrudden, filed July 23, 1991, in the Court of Common Pleas which dismissed appellant's P.C.R.A. Petition asking for relief on CP No. 8510-1272.

QUESTIONS PRESENTED

I. Did the Post-Conviction Court err when it granted the Commonwealth's Motion to Dismiss, thus, dismissing the defendant's petition under the Post-Conviction Relief act?

ANSWER BELOW: NO.

STATEMENT OF THE CASE

PROCEDURAL HISTORY:

The defendant, having previously been charged with murder and related offenses, was assigned to The Honorable David Savitt for trial on or about February 13, 1986. At that time, the defendant entered a plea to murder in the second degree and thereafter, and on the same date, was sentenced to mandatory life in prison. At trial, the defendant was represented by counsel other than this counsel and after trial, no direct appeal was taken. On or about August 21, 1986, the defendant filed a petition under the Post-Conviction Hearing Act and thereafter, Franklin D. Green, Esquire, was appointed to represent Mr. Pace. An Amended Petition was filed on March 31, 1987 alleging trial counsel's ineffectiveness. Thereafter, a Motion to Dismiss hearing was held in Room 788 City Hall on January 11, 1988, before The Honorable Joseph D. O'Keefe With the motion being held under advisement and with no decision having been rendered. Thereafter, Mr. Green withdrew, apparently for personal reasons, and this counsel was appointed. This counsel filed his own Amended P.C.R.A. Petition which was dismissed without an Evidentiary Hearing on July 23, 1991 by Order of The Honorable James D. McCrudden.

FACTUAL HISTORY:

On September 18, 1985, one Randolph Baldwin was assaulted on the highway and died ten (10) days thereafter. The defendant was arrested, gave an inculpatory statement and thereafter pled guilty to second degree murder, as indicated above.

SUMMARY OF THE ARGUMENT

The defendant received ineffective assistance of counsel, see *Commonwealth ex rel Washington vs. Maroney* and *Strickland vs. Washington*, as trial counsel did not inform defendant that his plea of second degree murder carried a mandatory life imprisonment sentence without possibility of parole and wherein counsel misled the defendant to thinking that he would, in fact, be eligible for parole after serving 10 to 15 years. Moreover, trial counsel was ineffective for failing to correct a trial judge who also led the defendant to believe that he would be eligible for parole after pleading guilty to second degree murder. In that the defendant received ineffective assistance of counsel and, in that the defendant did not have all of the necessary information from which to make a reasoned decision, the defendant's decision to plead guilty to second degree murder was not knowing, intelligent and voluntary and, hence, the defendant should be permitted to withdraw his plea and proceed to trial.

ARGUMENT

POINT I

THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE TRIAL STAGE AND IS ENTITLED TO A NEW TRIAL.

The defendant's appellate argument is straight forward and simple, to wit, that he received ineffective assistance of counsel at trial and is therefore entitled to a new trial in that trial counsel did not advise him that a "life sentence" meant life without parole and, in fact, trial counsel led the defendant to believe that he would be eligible for parole after serving the period of time in the state prison system and wherein the trial judge, during the colloquy, made certain remarks indicating that the defendant would indeed be eligible for parole.

It is certainly Horn Book law that a guilty plea, to be valid, must have been made in a knowing, intelligent and voluntary manner. Pursuant to the P.C.R.A. Petition, the defendant testified before Judge McCrudden on March 26, 1991. The defendant, according to police records, was age 17 on September 30, 1985, when an inculpatory statement was taken, thus making him no more than age 18 on February 13, 1986, when he pled guilty before Judge Savitt. Mr. Pace went to the 10th grade in school (N/T, 3/26/91, Page 11). Speaking of the advice that his trial counsel gave him, Mr. Pace told Judge McCrudden that:

> "She told me that I would receive ten (10), twelve (12) or fifteen (15) years. That's how much time I would do. It is not like it's the rest of my life. This is what she told me." (N/T, 3/26/91, p. 10).

At that same hearing, at page 10, the following questions and answers were given:

QUESTION:	Now, you know when you appeared in front of Judge Savitt, he did question you about that and he did tell you that you would be doing a life sentence and that he had no discretion and you acknowledged on the record that you understood that. Do you understand that? Do you recall that?
ANSWER:	Yes, I do.
QUESTION:	Can you explain to His Honor, Judge McCrudden, what you were thinking when Ms. Dunworth told you that you would be doing 10 or 12 years and His Honor told you he has no discretion, it's going to be life?
ANSWER:	I never know what life meant. I never come across anybody. I was going on basically what my counsel told me, that I would do 10, 12 or 15 years.
THE COURT:	You heard the Judge say that you would do a life sentence?
THE APPELLANT:	I didn't know what life sentence meant.
THE COURT:	What did you think it meant?
THE APPELLANT:	I don't know. She told me to plead guilty.

QUESTION BY
MR. RUDENSTEIN: When he was talking about life sentence and your attorney was talking about something in the range of 10 to 12 years, were you thinking that you would be paroled at some point?

THE APPELLANT: Yes, I did.

Certainly any 18 year old young man with a 10th grade education would have been confused enough by the discrepancy between the Judge's remarks and his counsel's advice, but it got worse during the part of the colloquy where Judge Savitt said the following:

> "With regard to counsel's request, I surely will recommend and make part of the sentencing Order that the defendant be confined at Camp Hill or a suitable facility for someone of his age, where he can obtain some help toward *rehabilitation,* particularly since he is a young man and, at *some time in the future, may be subject to release* and it is hoped that the prison sentence, for *whatever duration it be*, certainly aid in rehabilitating him." (Emphasis added by counsel) (N/T, 2/13/86, p. 43).

Counsel had an absolute duty to explain to her client that he was pleading guilty to a crime that carried a mandatory life sentence *and* life, in Pennsylvania, means life without possibility of parole. Without all of the necessary and possible information that he was entitled to receive, it is impossible to say that the defendant's choice to plead guilty was knowing, intelligent, or voluntary. While it may be indisputable that the defendant took certain actions that led to the death of the victim, it cannot be argued that murder in the second degree was the only

possible verdict, nor can it be argued that a life sentence was the only possible sentence. Murder in the third degree was a possible verdict and, certainly, the sentence would have been much less than life. This is not pure conjecture on this counsel's part as trial counsel, at pages 15 and 16 of the trial transcript, informed Judge Savitt of the following:

> "Mr. Baldwin apparently said something to my client, such as 'What are you doing?', or something to that effect. My client said, 'What do you mean?'. He said, 'I know what you are up to'; that is Mr. Baldwin.
>
> Mr. Baldwin according to the statement, reached out to my client. My client had a blackjack in his pocket.
>
> He hit Mr. Baldwin with the blackjack, he did not rob Mr. Baldwin. There is certainly an intimation that my client may have contemplated that, at least according to the statements. There were two statements.
>
> My client walked away from Mr. Baldwin and, apparently, there was an officer who was in a patrol car, Officer Little, who witnessed the latter part of the incident.
>
> I think it's significant, Your Honor, that the officer indicated in the statement that he gave subsequent to this, to the arrest of my client for murder, that it looked to him like a fist fight was ensuing, so it's a very ticklish question as to when the intent to rob occurred."

Thus, from the transcript itself, it is clear that trial counsel believed that there existed a viable defense to first

and second degree murder but yet, counselled the defendant to plead guilty to second degree murder and its mandatory life imprisonment sentence, but failed to inform the defendant that it would be life without parole but yet held out hope to the defendant that he might serve only between 10 and 15 years which was consistent with a plea to third degree but not to second degree.

While it is true that Judge Savitt did inform the defendant that he would be pleading guilty to a life sentence, it is equally true that his own counsel, as well as the judge, said things that would make a reasonable person, especially a young man with a 10th grade education believe that he would serve a term of years and then become eligible for parole on his life sentence. This is not some fantasy of the defendant's; it was a product of what he was told together with being a product of common belief in American, to wit, that murderers do not serve their full sentences. The news media, both print and electronic, are replete with stories, almost on a daily or weekly basis, of some criminal, and perhaps, some murderer, who did not serve a full sentence before coming eligible for parole. People know that Charles Manson periodically comes up for parole even in light of his gruesome, multiple murders. Thus, the defendant's belief was not a fantasy but was grounded in fact, both from what he knows as a citizen of the country and from what the judge and his own defense counsel told him. In that the defendant did not have all of the facts and, further, in that the defendant did have viable alternatives of which he was unaware, the defendant's plea was not knowing, intelligent and voluntary and, hence, he should be permitted to withdraw his plea and go to trial, as he received ineffective assistance of counsel. See *Commonwealth ex rel Washington vs. Marone*, 427 Pa. 599, 235 A. 2d 349 (1967) and *Strickland vs. Washington*, 104 S. Ct. 2052 (1984).

CONCLUSION

For the foregoing reasons and arguments, this counsel respectfully requests that a new trial be granted to the defendant/appellant, John Pace.

Respectfully submitted by:
/s/ David Rudenstein
DAVID RUDENSTEIN,
Esquire,
Attorney for defendant/
appellant

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA,	:	OCTOBER TERM, 1985
vs.	:	NOS. 1272-1275
JOHN A PACE,	:	

ORDER

AND NOW, TO WIT this 23RD day of JULY, 1991, it is hereby *ORDERED AND DECREED* that the Commonwealth's Motion to Dismiss the Defendant's Petition for Relief under the Post Conviction Hearing/Relief Act is *GRANTED* and the Defendant's Petition is *DISMISSED*.

BY THE COURT:
/s/ [Illegible]
J.

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
Appellee	:	Superior Court No. 02429 PHL 1991
— vs.	:	Common Pleas No.
JOHN PACE,	:	8510-1272
Appellant	:	

PROOF OF SERVICE

I hereby certify that I am this 10th day of October serving the foregoing document(s) upon the person(s) and in the manner indicated below:

Service by First Class Mail addressed as follows:

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LYNNE ABRAHAM
DISTRICT ATTORNEY

November 25, 1991

David A. Szewczak, Esquire
Prothonotary
Superior Court of Pennsylvania
530 Walnut Street
Philadelphia, Pennsylvania 19107

Re: **Commonwealth v. John Pace**
No. 2429, Philadelphia 1991

Dear Mr. Szewczak:

On February 13, 1986, defendant pled guilty to second degree murder and possessing an instrument of crime (Nos. 1272, 1275, October Term, 1985) before the Honorable David N. Savitt.[1] Judge Savitt sentenced defendant to life imprisonment for the murder and a concurrent term of one to two years for possessing an instrument of crime. Content with his guilty plea, defendant did not move to withdraw the plea, modify the sentence, or appeal.

Six months later, however, defendant had a change of heart and filed a *pro se* petition for relief under the Post

[1] On September 18, 1985, at approximately 4:35 a.m., while attempting to rob fifty-six year old Randolph Barwin, defendant struck the victim repeatedly on the head with a blackjack. The victim died one week later as a result of the severe head injuries he sustained during the robbery (N.T. 2-13-86, 49-63).

Conviction Hearing Act.[2] With the aid of appointed counsel, he filed an amended petition. Following a hearing on the Commonwealth's motion to dismiss but before a decision was rendered, counsel withdrew and present counsel was appointed to represent defendant. A second amended PCHA petition was filed, alleging for the first time that trial counsel's ineffectiveness resulted in an unknowing, unintelligent and involuntary plea.[3] Upon the Commonwealth's motion to dismiss the new petition, another hearing was held on March 26, 1991. At that hearing, defendant testified that during the guilty plea colloquy he had not understood what it meant to be sentenced to life imprisonment (N.T. 3-26-91, 10). On July 23, 1991, the Honorable James D. McCrudden granted the Commonwealth's motion to dismiss defendant's petition.

On appeal from this denial of relief, defendant now repeats that claim. Although the Commonwealth will not file a formal brief, it opposes granting defendant any relief because his claim is meritless.

[2] 42 Pa. C.S.A. § 9541 *et seq.* (1982) (superseded) (hereinafter PCHA). The PCHA has been modified in part and renamed the Post Conviction Relief Act (hereinafter PCRA), effective April 13, 1988, 42 Pa. C.S.A. §§ 9541-46. The new provisions apply to all actions for collateral relief filed on or after the effective date.

[3] Although this second amended petition was filed after the effective date of the PCRA *(see* footnote 2, *supra)*, because the original petition was filed under the PCHA, the instant claim must be analyzed pursuant to the terms of the PCHA, not the PCRA.

I. DEFENDANT WAIVED HIS CHALLENGE TO THE VALIDITY OF THE GUILTY PLEA BY NOT FILING A PETITION WITH THE TRIAL COURT TO WITHDRAW THE PLEA, BY NOT APPEALING HIS JUDGMENTS OF SENTENCE, AND BY NOT SUSTAINING HIS BURDEN OF PROOF NOW.

Defendant contends that the PCHA court erred in granting the Commonwealth's motion to dismiss his petition. He claims that although the court and counsel informed him that his plea carried a mandatory sentence of life imprisonment, he nonetheless interpreted certain comments made by the court and counsel to mean that despite being sentenced to life imprisonment, he would be eligible for parole in ten to fifteen years.[4] Accordingly, defendant faults counsel for failing to ensure that he understood the true import of a life sentence before he entered his guilty plea, and contends that in the absence of that information, his plea was involuntarily tendered.

Defendant's claim is waived. At the guilty plea hearing, defendant was explicitly advised that in order to challenge the validity of his guilty plea, he was required to file a motion to withdraw the plea within ten days of the imposition of sentence (N.T. 2-13-86, 73). *See* Pa.R.Crim.P 321[5]. Because defendant failed to file this motion and

[4] Life imprisonment in Pennsylvania means life imprisonment without the possibility of parole.

[5] Pennsylvania Rule of Criminal Procedure 321 provides, in pertinent part:

> A motion challenging the validity of a guilty plea, or the denial of a motion to withdraw a guilty plea shall be in writing and shall be filed with the trial court within ten (10) days after imposition of sentence.

Pa.R.Crim.P. 321(a).

never offered any excuse for his failure, his claim is not preserved for appellate review.

42 Pa.C.S.A. §9544(b); *Commonwealth v. Spencer,* 344 Pa. Super. 380, 496 A.2d 1156, 1160 (1985).

Defendant was further advised at the colloquy that he had thirty days from the imposition of sentence to file a direct appeal (N.T. 2-13-86, 73). Because he did not appeal, it is presumed that he made a knowing and understanding decision to forego review. *Commonwealth v. Jackson,* 329 Pa. Super. 293, 478 A.2d 474, 477 (1984). Defendant does not bother to rebut the presumption; indeed, he does not even blame counsel for his failure to file an appeal. Rather, he simply invokes the magic words "ineffectiveness of counsel" to avoid a finding of waiver for PCHA purposes. Attacks on the effectiveness of counsel, however, may not be used to circumvent the consequences of waiving an issue. *Commonwealth v. Klinger,* 323 Pa. Super. 181, 470 A.2d 540 (1983).

Ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only where the ineffectiveness causes the defendant to enter an involuntary or unknowing plea. *Id.* While defendant alleges that counsel and the court misled him into believing that his plea carried the probability of parole, he does not argue that he would not have entered guilty pleas had he clearly understood that a life sentence meant life in prison. Absent that argument, defendant's claim must be rejected. *C.f. Commonwealth v. Jackson,* 330 Pa. Super. 144, 479 A.2d 5 (1984) (no relief where appellant did not allege that he would not have entered favorable plea bargain had he known possible fines); *Commonwealth v. Klinger, supra*

(appellant did not allege that he was ignorant of requirement of unanimous verdict or that he would not have pled guilty had he known it); *Commonwealth v. Campbell,* 309 Pa. Super. 214, 455 A.2d 126 (1983) *(allocatur* denied) (appellant did not allege that he would not have entered guilty plea if court had explained the elements of the crimes charged); *Commonwealth v. Anthony,* 307 Pa. Super. 312, 453 A.2d 600 (1982), *aff'd,* 504 Pa. 551, 475 A.2d 1303 (1984) (appellant did not allege that he would not have entered guilty plea if he had known of requirements of unanimous verdict).

II. IN ANY EVENT, EVEN IF REVIEWED ON THE MERITS, TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE AND DEFENDANT VOLUNTARILY ENTERED THE PLEA.

Defendant contends that his plea was not voluntary, intelligent and knowing because he had been ineffectively misled by his counsel and the court as to what sentence he would receive. However, there is a presumption that counsel acted effectively. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 2065 (1984); *accord Commonwealth v. Pierce,* 515 Pa. 153, 527 A.2d 973, 975 (1987). To prevail on a claim of ineffectiveness, defendant must demonstrate the arguable merit of the claim underlying the allegation of counsel's deficient performance, the lack of any reasonable basis for counsel's action, and that he was prejudiced by counsel's substandard performance. *Strickland v. Washington,* 104 S.Ct. at 2064; *accord Commonwealth v. Pierce,* 527 A.2d at 975. The burden always rests on the defendant to overcome counsel's presumed effectiveness and to show true prejudice, *i.e.,* by demonstrating that, but for counsel's errors, he would not

have entered the plea. *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366 (1985); *Commonwealth v. Frometa,* 366 Pa. Super. 313, 531 A.2d 434 (1987), *rev'd on other grounds,* 520 Pa. 552, 555 A.2d 92 (1989). Viewed in this light, defendant's claim will not stand up.

During his colloquy, defendant was twice told in no uncertain terms that by entering a guilty plea he would be sentenced to life imprisonment (N.T. 2-13-86, 43-45). There is not one word in the colloquy about anything less than life imprisonment.[6] When the court asked defendant if he understood that he would be sentenced to life imprisonment, defendant replied, "Yes;" and when the court asked defendant if he still wished to plead guilty in the

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[6] Defendant points to a comment made by Judge Savitt after defendant had been colloquied and sentenced to demonstrate that the court incorrectly believed that parole was in defendant's future and that the court conveyed that message to defendant:

> . . . I surely will recommend and make part of the sentencing order that the defendant be confined at Camp Hill or a suitable facility for someone of his age, where he can obtain some help toward rehabilitation, particularly since he is a young man and at some time in the future, may be subject to release and it is hoped that the prison sentence, for whatever duration it be, certainly aid him in rehabilitating him

(N.T. 2-13-86, 72). Defendant's attempt to utilize this remark to support his claim is wholly unwarranted. Judge Savitt well understood that life imprisonment meant life imprisonment without the possibility of parole, but he also recognized that there was an outside chance that the governor might commute the life sentence sometime in the future because of defendant's young age, and that, in such event, rehabilitative programs in prison would serve defendant well. His comment after he sentenced defendant certainly does not mean that the judge incorrectly believed and conveyed to defendant that parole was a distinct possibility or probability. Judge Savitt knew that parole was a legal impossibility. *See Commonwealth v. Rozplochi,* 385 Pa. Super. 357, 561 A.2d 25, 31 (1989) (judge is presumed to know the law).

face of a life sentence, defendant answered, "Yes." Defendant certainly may not obtain relief now by insinuating that his colloquy responses demonstrating his understanding that he would be sentenced to life in prison were lies. *Commonwealth v. Cortino,* 387 Pa. Super. 210, 563 A.2d 1259 (1989).

Defendant nonetheless insists that despite his on-the-record assurances that he understood his sentence before he entered his plea, he really believed that "life" meant something substantially less that "life," although he did not have any idea what that lesser term might be (N.T. 3-26-91, 10). He harbored this belief, he says, because virtually everyone in America harbors the same belief, and because the court and counsel effectively confirmed that belief. For several reasons, this argument must be summarily rejected.

Defendant insists that his misimpression about the meaning of a life sentence in Pennsylvania stemmed from a commonly held belief in America that a life sentence is really less than a life sentence. There is nothing in the record to support either that defendant based his misimpression on such a belief, or that such an alleged "common belief" even exists. Accordingly, this Court may not entertain those notions in its analysis of defendant's claim. *See Commonwealth v. Griffis,* 310 Pa. Super. 547, 456 A.2d 1071 (1983) (appellant does not develop record that appellate court may consider merely be making factual allegations in appellate brief).

Even if defendant's hope of serving a sentence of less than life was the motivating factor in his entry of a guilty plea, still there would be no basis for withdrawal of the plea. Defendant simply may not use his misplaced hope of

beating the mandatory life sentence (which he clearly was advised he faced) as a ground for withdrawal of his plea. *See Commonwealth v. Waddy,* 463 Pa. 426, 345 A.2d 179 (1975); *Commonwealth v. West,* 336 Pa. Super. 180, 485 A.2d 490 (1984). This is true even if defendant had relied on counsel's advice that a more lenient outcome was likely. *Commonwealth v. Egan,* 322 Pa. Super. 71, 469 A.2d 186 (1983) (*en banc*); *Commonwealth v. Harris,* 286 Pa. Super. 601, 429 A.2d 685 (1981).[7]

Moreover, defendant has not demonstrated the alleged prejudice he sustained as a result of counsel's actions, opting instead to rest his claim on a conclusory assertion of such prejudice. His failure to shoulder his burden of proof in this regard is fatal to his claim. *See Commonwealth v. Hilton,* 400 Pa. Super. 579, 584 A.2d 334 (1990) (appellant claiming ineffectiveness must sustain prejudice prong of three-pronged ineffectiveness test). Defendant's quest for appellate relief must fail.

[7] Even if there were some merit to defendant's underlying claim, he has not demonstrated, as he must, that trial counsel did not have a reasonable basis for her actions. *See Commonwealth v. Jones,* No. 1506 Pittsburgh 1990 (Pa. Superior, filed August 20, 1991) (the unreasonableness of counsel's actions is a prong that must be proved). Here, although he could have done so, defendant did not explore this matter with trial counsel at the evidentiary hearing on his PCHA petition. Hence, he has forfeited his opportunity to sustain his burden of proving ineffectiveness of counsel. *See Commonwealth v. Bowers,* 245 Pa. Super. 214, 369 A.2d 370 (1976) (by failing to provide the evidence necessary to prove claim, appellant effectively concedes that he cannot prove that counsel lacked reasonable basis for decision).

III. CONCLUSION.

For the foregoing reasons, the Commonwealth respectfully requests this Court to affirm the denial of post-conviction relief.

Respectfully submitted,

/s/ John K. McDonald
JOHN K. McDONALD
Assistant District Attorney

/s/ Joan Weiner
JOAN WEINER
Assistant District Attorney

/s/ Donna G. Zucker
DONNA G. ZUCKER
Assistant Chief, Appeals Unit

cc: Honorable James D. McCrudden
David Rudenstein, Esquire

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
v.	:	PENNSYLVANIA
JOHN PACE,	:	No. 2429 Philadelphia 1991
Appellant	:	Submitted: November 25, 1991
	:	(Filed Mar. 30, 1992)

Appeal from Post Conv. Relief Act July 23, 1991, in the Court of Common Pleas of Philadelphia County, Criminal No. 8510-1272 thru 1275.

BEFORE: OLSZEWSKI, KELLY, and BROSKY, JJ.

MEMORANDUM:

This is an appeal from the order of the Court of Common Pleas of Philadelphia County granting the Commonwealth's motion to dismiss appellant's petition for post conviction relief. Finding no error in the lower court's dismissal of appellant's petition, we affirm the order of the lower court. A discussion of the case follows.

Appellant pled guilty to second-degree murder and, possession of an instrument of crime on February 13, 1986,[1] and was sentenced to life imprisonment for murder and one to two years to run concurrently for possession of an instrument of crime. No motion to withdraw or reconsider the guilty plea was filed, and appellant did not take a direct appeal. Some six months after his guilty plea and

[1] The charges arose out of the September 18, 1985, beating death of Randolph Baldwin during the course of a robber.

sentencing, appellant filed a *pro se* petition for relief under the P.C.H.A.[2] Two amended petitions were filed by appellant's two post conviction counsel. A hearing was held on March 26, 1991, at which appellant testified. On July 23, 1991, the lower court granted the Commonwealth's motion to dismiss.

Appellant argues that the lower court erred in dismissing his petition for post conviction relief. Appellant's argument is that he was somehow misled into entering his guilty plea by the statements and advice of his counsel and by the statements of the court. Further, appellant argues that his counsel was ineffective for failing to properly advise him of the consequences of his guilty plea. We find no merit to appellant's arguments.

Appellant's argument with regard to being misled by the statements of counsel and the court is that he was misled as to the nature of a life sentence. Similarly, appellant has argued that his counsel was ineffective for failing to properly inform him of the nature of a life sentence. Appellant argues that he did not know that a life sentence in Pennsylvania means a life sentence without the possibility of parole. Appellant argues that he held a mistaken belief that a life sentence somehow meant a term of years.

Appellant's argument that he was misled into entering a guilty plea by the statements of the court is without merit. Prior to accepting appellant's guilty plea, the lower court conducted an extensive guilty plea colloquy with appellant. We have reviewed this colloquy and find that it adequately informed appellant of the consequences of his

[2] Post Conviction Hearing Act, 42 Pa.C.S.A. § 9541-9551 (Purdon's 1982).

plea. Further, we find nothing in the statements or questions of the court which could have misled appellant regarding the consequences of his plea. Regarding the statements of the court, we have reviewed the transcript of the colloquy and see nothing that indicates that appellant would receive other than a life sentence. In the opinion of this Court, a life sentence in Pennsylvania means a life sentence – nothing more, nothing less. There is no chance of parole for a person sentenced to life imprisonment in Pennsylvania.[3] The colloquy conducted by the lower court indicated nothing else to appellant.[4] Appellant's argument that he was misled by the statements of the lower court is without merit.

Regarding appellant's argument that his counsel at the guilty plea colloquy misled him into believing that a life sentence was other than a life sentence without the possibility of parole, we find that the lower court's colloquy handled any potential misunderstanding. The lower court specifically asked appellant at the colloquy whether he understood that once the judge accepted the plea, it would be up to the judge to sentence him and there would be no

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[3] There, of course, exists the possibility that the governor could commute the life sentence to a term of years.

[4] Appellant has argued that the lower court made a statement that the court would recommend that appellant be confined where he could receive some rehabilitative treatment. Appellant argues that this misled appellant into entering his guilty plea because it indicated that he would at some point be subject to parole. The court below did not indicate that appellant would ever be subject to parole. Further, the statement of which appellant complains occurred not during the colloquy but, rather, after the court had accepted appellant's guilty plea and had moved on to sentencing appellant. Since the statement occurred after appellant had entered his guilty plea, we do not see how it could have influenced appellant to enter his plea.

"negotiations or understandings." (N.T. February 13, 1986, at 42.) The court then went on to explain to appellant that the sentence for second-degree murder would be life imprisonment and that the court would have no discretion in that regard. (N.T. February 13, 1986, at 42-45.)

Appellant was fully informed that a life sentence would be imposed. "It is axiomatic that a disappointed expectation regarding a sentence does not constitute grounds for withdrawing a guilty plea." *Commonwealth v. West,* 336 Pa.Super. 180, ___, 485 A.2d 490, 493 (1984) (citations omitted). Appellant was fully informed of the mandatory life sentence. He is entitled to no relief based on an argument that he expected a life sentence to be a term of years. The colloquy is complete and quite clear that a life sentence would be imposed and that no other agreements or negotiations regarding sentencing would be considered. Appellant's argument that he was misled by his counsel is without merit.

Appellant has also argued that his counsel at the guilty plea was ineffective for failing to inform him properly that a life sentence meant a life sentence and not a term of years. Generally, it is presumed that counsel is competent, and appellant bears the burden of establishing otherwise. *Commonwealth v. Williams,* 524 Pa. 218, 570 A.2d 75 (1990). In order to prevail upon a claim of ineffective assistance of counsel, appellant must establish, [illegible] unreasonable, that another meritorious course was available and that defendant [appellant] was prejudiced by counsel's ineffectiveness." *Id.* at ___, 570 A.2d at 81. "Allegations of ineffectiveness of counsel in connection with a guilty plea will provide a basis for relief only if ineffectiveness caused an involuntary or unknowing plea." *West,* at ___, 485 A.2d at 493. As was stated above, we

believe the court's colloquy adequately informed appellant that he would be sentenced to a life sentence. Appellant's averments that he was misled by the statements of his counsel are in contradiction to the fact that he was fully and properly informed of the consequences of his plea by the court. In light of the fact that the court fully informed appellant of the consequences of his plea, we cannot find that any ineffectiveness of his counsel resulted in an involuntary plea. We find no merit to appellant's argument regarding ineffectiveness of counsel.

Finding no merit to appellant's arguments, we affirm the order of the lower court dismissing appellant's petition for post conviction relief.

Order affirmed.

IN THE SUPREME COURT OF PENNSYLVANIA.,
EASTERN DISTRICT OF PENNSYLVANIA.

COMMONWEALTH OF PENNSYLVANIA.	:	BILL NO. 1272-1275.
	:	TERM NO. OCTOBER 1985.
-v-	:	
	:	RE: UNDOCKETED
JOHN A. PACE.	:	ALLOCATUR NUMBER,
	:	MAY 1992

PRO SE – PETITION FOR PERMISSION TO FILE PETITION FOR ALLOWANCE OF APPEAL NUNC PRO TUNC. PURSUANT TO 42 C.S.§.724(A) PA. R.A.P. #1112.

YOUR PRO SE PETITIONER RESPECTFULLY MOVES THE HONORABLE SUPREME COURT OF PENNSYLVANIA TO GRANT PERMISSION TO FILE PETITION FOR ALLOWANCE OF APPEAL NUNC PRO TUNC IN SUPPORT OF MERITORIOUS REASONS AND ALLEGATIONS AS TO, THE FOLLOWING:

1.) PRIOR P.C.R.A. COUNSEL DAVID S. RUDENSTEIN., ABANDONED – JOHN A. PACE THE PETITIONER IN FAILING TO ASSIST IN HIS ADVANCE REQUEST TO ATTORNEY TO PURSUE AND TAKE AN TIMELY ALLOCATUR APPEAL IN SUPREME COURT IN THIS INSTANT CASE. *NOTE*: SEE EXHIBIT #4 TO SUPPORT THIS ALLEGATION. (EXHIBIT #4., ATTACHED TO ALLOCATUR PETITION).

2.) PRIOR P.C.R.A. COUNSEL DAVID S. RUDENSTEIN., IN ORDINATE RESPONSE, TO PETITIONER'S ADVANCED REQUEST TO PURSUE AND TAKE AN APPEAL DID CONSEQUENTLY. DELAYED PRO SE PETITIONER IN PURSUING AND FILING A TIMELY NOTICE

AND ANOCATUR APPEAL IN THE SUPREME COURT AS REQUIRED UNDER PA. R.A.P.#1112. ESPECIALLY, WHERE P.C.R.A. COUNSEL'S RESPONSE WERE WRITTEN AND DATED ON 4.29/92. AND RECEIVED ON OR ABOUT 5/4/92 OVER LAPPING THE DUE DATE MANDATED FOR, A TIMELY ALLOCATUR APPEAL TO BE FILED. *NOTE:* SEE EXHIBIT #5.TO SUPPORT THIS ALLEGATION. (EXHIBIT #5 ATTACHED TO ALLOCATUR PETITION).

3.) THEREAFTER AND CONSEQUENTLY TO P.C.R.A. COUNSEL DAVID S. RUDENSTEIN'S ACTIONS AND OR NON-ACTIONS IN FAILURE TO PURSUE AND TAKE AN ALLOCATUR APPEAL. THE PRO SE-PETITIONER NEEDED TO PRESERVE TIME TO SEEK A PROFESSIONAL PARALEGAL AT S.C.I.H. PRISON, WHERE AS, CONSEQUENTLY TO HIS ATTEMPTS AND SEEKING HE DID MANAGED TO RETAIN A PROFESSIONAL PARALEGAL NAMED MACK KING, WHO IS PREPARING AND LITIGATING THE FOREGOING ALLEGATIONS AND ISSUES HEREIN THE, INSTANT ALLOCATUR APPEAL PETITION FOR P.C.R.A. RELIEF TO THE PETITIONER JOHN A PACE.

CONCLUSION.

THEREFORE, FOR ALL THE FOREGOING MERITORIOUS REASONS AND ALLEGATIONS STATED HEREIN THIS PLEADING. IT IS HEREBY DECLARED THAT THE HONORABLE COURT WILL GRANT PRO SE PETITIONER'S PETITION FOR PERMISSION TO FILE PETITION FOR ALLOWANCE OF APPEAL NUNC PRO TUNC IN THAT PRO SE PETITIONER/APPELLANT MAY PURSUE HIS RIGHTS TO APPEAL AND ACCESS TO COURT INTER ALIA IN THE INSTANT ALLOCATUR APPEAL PETITION FOR P.C.R.A. RELIEF THE

PETITIONER/APPELLANT JOHN A. PACE, HERETOFORE AND HEREUPON IS SEEKING FORTHWITH.

EXECUTED DATE: 06/26/92.

RESPECTFULLY SUBMITTED

/s/ John A. Pace
JOHN A. PACE., #AY-6445
S.C.I.H.
P.O. DRAWER R,
HUNTINGDON, PA. 16652

ATTESTED BY: MACK KING., AF-8679., A CERTIFIED PROFESSIONAL PARALEGAL FOR S.C.I.H. CONCERNED PRISONERS FOR EQUAL JUSTICE.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT OF PENNSYLVANIA.

COMMONWEALTH OF PENNSYLVANIA.	:	BILL NO. 1272-1275.
	:	TERM NO. OCT. 1985.
-v-	:	
	:	UNDOCKETED
JOHN A. PACE.	:	ALLOCATUR NUMBER,
(PRO SE APPELLANT)	:	_____.

PROOF OF SERVICE.

I, JOHN A. PACE, HEREBY CERTIFY THAT I AM THIS DATE OF 06/26/92 SERVING THE FOREGOING PRO SE PETITION FOR PERMISSION TO FILE PETITION FOR ALLOWANCE OF APPEAL NUNC PRO TUNC UPON PERSON AND IN MANNER INDICATED BELOW WHICH SERVICE SATIFY THE REQUIREMENTS OF PA. R.C.P. #121 BY FIRST CLASS U.S. MAIL TO:

DISTRICT ATTORNEY'S OFFICE OF
PHILADELPHIA COUNTY
C/O DISTRICT ATTORNEY LYNNE ABRAHAM.
APPEALS UNIT 1421 ARCH STREET.
PHILADELPHIA, PA. 19102

EXECUTED DATE: 06/26/92.

/s/ John A. Pace
JOHN A. PACE., #AY-6445
S.C.I.H.
P.O. DRAWER R,
HUNTINGDON, PA. 16652

ATTESTED BY: MACK KING. A CERTIFIED PROFESSIONAL PARALEGAL.

IN THE SUPREME COURT OF PENNSYLVANIA,
EASTERN DISTRICT OF PENNSYLVANIA.

COMMONWEALTH OF PENNSYLVANIA	:	C.P. #1272-1275. OCTOBER 1985.
-v-	:	
JOHN A. PACE. (PETITIONER)	:	

PETITIONER'S MOTION FOR LEAVE TO
REDUCE COPIES OF PETITION FOR ALLOCATUR
APPEAL. INCONFORMITY TO
42 PA. C.S.A. §.724(A) PA.R.A. P. 1112.

YOUR PETITIONER JOHN A. PACE., RESPECTFULLY MOVES THE HONORABLE SUPREME COURT OF PENNSYLVANIA, TO GRANT LEAVE TO REDUCE COPIES ON PETITION FOR ALLOCATUR APPEAL FOR REASONS AS TO FOLLOWING:

1. PETITIONER IS A PAUPER PROCEEDING AS A PRO SE-LITIGANT ON THIS INSTANT CASE, ON ALLOCATUR APPEAL.

2. PETITIONER WISH TO LESSEN THE AMOUNT OF MONIES HE SPEND FOR ALL PETITIONS AND OTHER NECESSARY COURT MATERIAL THAT NEEDS XEROXING AND POSTAGE FEES PAID. THEREFORE, THE PETITIONER WISH TO REDUCE THE AMOUNT OF PETITIONS FROM EIGHT COPIES AND ORIGINAL COPY TO THREE AND ORIGINAL COPIES OF ALLOCATUR PETITION PLUS ALSO INCLUDING A TRUE AND EXACT COPY OF ALLOCATUR PETITION NEEDED TO BE SERVED TO THE OFFICE OF MISS. LYNNE ABRAHAM. ESQUIRE, THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY.

3. PETITIONER STILL ARE NOT PRESENTLY EMPLOYED WHILE HE IS CONFINED AT STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, PA. 16652.

4. PETITIONER HAVE NOT RECEIVED WITHIN THE PAST TWELVE MONTHS ANY INCOME FROM A BUSINESS PROFESSION OR OTHER FORM OF SELF EMPLOYMENT OR NEITHER IN THE FORM OF RENT PAYMENTS, INTEREST, DIVIDENDS, OR OTHER, SOURCES.

5. PETITIONER STILL DO NOT HAVE ANY CASH OR CHECKING OR SAVING ACCOUNTS TO PAY THE COST FOR EIGHT AND ORIGINAL COPIES OF ALLOCATUR PETITION. (INCLUDING ONE COPY TO THE DISTRICT ATTORNEY)

6. PETITIONER STILL DO NOT OWN ANY REAL ESTATE, STOCKS, BONDS, NOTES, AUTOMOBILES

OR OTHER VALUABLE PROPERTY TO USE FOR SECURITY FOR THE COST OF COURT AND EIGHT AND ORIGINAL COPIES OF ALLOCATUR PETITION AND ATTORNEY FOR THIS INSTANT CASE. (INCLUDING ONE COPY TO THE DISTRICT ATTORNEY)

7. PETITIONER STILL DO NOT HAVE ANY PERSON WHO HE MAY DEPEND UPON FOR SUPPORT AND TO PAY THE COST OF COURT AND EIGHT AND ORIGINAL COPIES OF ALLOCATUR PETITION FOR THIS INSTANT CASE. FURTHERMORE, NONE OF PETITIONER'S FINANCIAL STATUS HAS CHARGE SINCE THE FILING OF HIS P.C.R.A. PETITION IN C.P. COURT AND A APPEAL IN SUPERIOR COURT OF PENNSYLVANIA. (AS A PAUPER PRO SE LITIGANT)

THEREFORE, YOUR PETITIONER REQUEST THAT HIS MOTION FOR LEAVE TO REDUCE COPIES (FROM NINE COPIES TO FOUR COPIES) ON ALLOCATUR PETITION WILL BE GRANTED FORTHWITH.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING INFORMATION IS TRUE AND CORRECT.

DATE: 06/26/92.

/s/ John A. Pace
JOHN A. PACE., #AY-6445
S.C.I.H.
P.O. DRAWER R,
HUNTINGDON, PA. 16652

IN THE SUPREME COURT OF PENNSYLVANIA
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

PROOF OF SERVICE.

I, JOHN A. PACE, HEREBY CERTIFY THAT I AM THIS 06/26/92 DAY OF JUNE, 1992. SERVING THE FOREGOING MOTION FOR LEAVE TO REDUCE COPIES ON ALLOCATUR PETITION UPON PERSONS AND IN MANNER WHICH SATISFY THE REQUIREMENT OF PA. R.C.P. #121 BY FIRST CLASS U.S. MAIL TO:

DISTRICT ATTORNEY'S OFFICE OF
PHILADELPHIA COUNTY
LYNNE ABRAHAM-DISTRICT ATTORNEY
1421 ARCH STREET.
PHILADELPHIA, PA. 19102

EXECUTED DATE: 06/26/92.

/s/ John A. Pace
JOHN A. PACE., #AY-6445
S.C.I.H.
P.O. DRAWER R,
HUNTINGDON, PA. 16652

EXECUTED AND ATTESTED BY: MACK KING. AF-8679., A CERTIFIED PROFESSIONAL PARALEGAL. (IN CONFORMITY TO PA. BAR RULE 371. SAVING PROVISION.

IN THE SUPREME COURT OF PENNSYLVANIA.,
IN EASTERN DISTRICT, AT.,
PHILADELPHIA, PENNSYLVANIA.

ALLOCATUR DOCKET NUMBER _____1992.

COMMONWEALTH OF PENNSYLVANIA

VS.

JOHN A. PACE., PRO SE APPELLANT.

PETITION FOR ALLOWANCE OF APPEAL,
NUNC PRO TUNC.

PETITION FOR ALLOWANCE OF APPEAL FROM THE DECISION OF THE SUPERIOR COURT, DATED ON THE 30TH DAY OF MARCH 1992. AT NO. 2429. PHILADELPHIA 1991. SAID ORDER AFFIRMING THE JUDGMENT OF THE COMMON PLEAS COURT OF PHILADELPHIA COUNTY. OF JUDGE JAMES D. McCRUDDEN ENTERED ON 23RD. DAY OF JULY 1991 FROM: P.C.R.A. RELIEF UNDER BILL AND TERM NUMBER(S) 1272-1275 OCTOBER 1985.

(X) PRIOR/( )CURRENT ATTORNEY
(X) PROCEEDING PRO SE.

DAVID S. RUDENSTEIN.
ADDRESS: SUITE 102, 8253 BUSTLETON AVE. PHILA, PA. 19152.

/s/ John A. Pace
APPELLANT: JOHN PACE. AY-6445

ADDRESS: P.O. DRAWER R,
HUNTINGDON, PA.16652

STATEMENT OF JURISDICTION

THE PENNSYLVANIA SUPREME COURT HAS ORIGINAL JURISDICTION OVER THIS INSTANT ALLOCATUR APPEAL PURSUANT TO 42. PA. C.S.A. §.724 (A) WHEREAS, THIS APPEAL WERE INITIALLY TAKEN FROM A FINAL ORDER/OPINION OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY PENNSYLVANIA AND AN APPEAL FROM THE ORDER AND OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA ON: 3/30/92, AFFIRMING THE JUDGMENT OF JUDGE JAMES D. McCRUDDEN OF THE COMMON PLEAS COURT OF PHILADELPHIA PENNSYLVANIA. ON: JULY 23RD, 1991.

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STATEMENT OF THE CASE.

THE PRO SE PETITIONER/APPELLANT IS JOHN A. PACE., AN INDIVIDUAL PRESENTLY, CONFINED AT STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. DRAWER R, HUNTINGDON, PA. 16652. ON SEPTEMBER 18, 1985 HE WAS CHARGED WITH MURDER AND POSSESSION OF AN INSTRUMENT OF CRIME HE WAS ASSIGNED TO HONORABLE JUDGE DAVID SAVITT FOR TRIAL ON OR ABOUT FEBRUARY 13, 1986. AT THAT PARTICULAR TIME THE DEFENDANT, ENTERED A UNKNOWINGLY AND UNINTELLIGENTLY GUILTY PLEA TO MURDER IN THE SECOND DEGREE UNDER AN ALLEGED PLEAD BARGIN OR PLEAD GUILTY FOR A .LESSER DEGREE OF CHARGE(S) AND THEREAFTER ON FEBRUARY 13, 1986. THE DEFENDANT JOHN A. PACE WERE SENTENCED TO A MANDATORY LIFE IMPRISONMENT FOR MURDER AND ONE TO TWO YEARS TO RUN CONCURRENTLY (TO LIFE) FOR POSSESSION OF AN INSTRUMENT OF CRIME. TRIAL COUNSEL WERE MOIRA DUNWORTH NO MOTION TO WITHDRAW GUILTY PLEAD OR TO RECONSIDER GUILTY PLEAD AND SENTENCE WAS FILED AND TRIAL COUNSEL DIDN'T TAKE A DIRECT APPEAL ON BEHALF OF DEFENDANT. (THE PETITIONER/APPELLANT) ON OR ABOUT AUGUST 21, 1986. THE DEFENDANT FILED A PETITION UNDER THE POST CONVICTION HEARING ACT AND THEREAFTER. *FRANKLIN D. GREEN. ESQUIRE.*, WAS APPOINTFD TO REPRESENT *MR. JOHN A. PACE.*, AN AMENDED P.C.R.A. PETITION WAS FILED ON MARCH 31, 1987, ALLEGING TRIAL COUNSEL'S INEFFECTIVENESS AND DELIBERATE INDIFFERENCE TO *MR. JOHN A. PACE*. THEREAFTER, A MOTION TO DISMISS HEARING WAS HELD

IN COURT ROOM # 788. CITY HALL IN PHILADELPHIA, PA. ON JANUARY 11, 1988 BEFORE THE HONORABLE JOSEPH D. O'KEEFE. THE SAID MOTION WERE PLACED UNDER ADUISEMENT AND WITH NO, DECISION HAVING BEEN RENDERED BY THE COURT. THEREAFTER, APPOINTED COUNSEL FRANKLIN D. GREEN, WITHDREW FROM THE P.C.R.A. PETITION FOR SOME ALLEGED PERSONAL REASONS. AND THEREAFTER, DAVID RUDENSTEIN, ESQ. WERE APPOINTED TO COUNSELED DEFENDANT'S P.C.R.A. PETITION. THIS COUNSEL FILED A SECOND AMENDED P.C.R.A. PETITION ON JULY 23, 1991. THE PETITION WAS DISMISSED WITHOUT AN EVIDENTIARY, HEARING AND NO RULE TO SHOW PROBABLE CRITERIA OF WHY P.C.R.A. RELIEF SHOULD NOT BE GRANTED TO DEFENDANT (PETITIONER/APPELLANT) JOHN A. PACE BY ORDER OF THE HONORABLE JAMES D. McCRUDDEN ON OCTOBER 10, 1991. DAVID RUDENSTEIN, APPOINTED COUNSEL FOR DEFENDANT, (PETITIONER/APPELLANT) FILED AN NOTICE OF APPEAL BETWEEN JULY 23RD, AND JULY 29, 1991 AND THEREAFTER THIS SAME COUNSEL ASLO FILED A BRIEF ON 10/10/91 FOR APPELLANT IN SUPERIOR COURT. ON MARCH 30 THE SUPERIOR COURT THEREBY AFFIRMED THE JUDGMENT OF THE COMMON PLEAS COURT OF PHILADELPHIA COUNTY IN THAT DENYING THE DEFENDANT, (PETITIONER/APPELLANT) P.C.R.A. RELIEF ON HIS PETITION. THEREAFTER DAVID RUDENSTEIN., (P.C.R.A. AND APPELLATE COUNSEL) FAILED TO PURSUED AND TAKE DEFENDANT'S (PETITIONER/APPELLANT) INSTANT CASE FURTHER ON AN PETITION FOR ALLOWANCE OF APPEAL IN THIS HONORABLE

SUPREME COURT OF PENNSYLVANIA, TO SEEK ELIGIBLE P.C.R.A. RELIEF DEFENDANT (PETITIONER/APPELLANT) ARE ENTITLED THEREOF. THEREFORE, DEFENDANT (PETITIONER/APPELLANT) THEREBY HAVE ENTERED THE FOREGOING INSTANT PRO SE ALLOWANCE OF APPEAL FOR THE HONORABLE COURT TO REVIEW, RECONSIDER, AND ACCEPT JOHN A. PACE'S ALLOWANCE OF APPEAL PLEADING UNDER THESE MERITORIOUS ALLEGATIONS AND CLAIMS, FOR ADJUDICATION TO P.C.R.A RELIEF IN WHICH PETITIONER/APPELLANT JOHN A. PACE, HEREBY SEEKS HEREIN WITH GOOD WILL AND GOOD FAITH.

STATEMENT OF QUESTIONS INVOLVED

1. *DID THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN*:

A. *NOT CONSIDERING AND ACCEPTING THE FACT THAT TRIAL COUNSEL AND ALL OTHER SUBSEQUENTED APPOINTED COUNSEL(S) WERE INEFFECTIVE BY NOT PRESERVING ALL CLAIMS ON APPEAL AND POST CONVICTION RELIEF ACT PETITIONS AND APPEAL OF THE SAME*?

B. THAT ALL APPOINTED COUNSELS' ACTIONS AND OR NON-ACTON HAVE RESULTED IN A MISCARRIAGE OF JUSTICE, WITH DELIBERATE INDIFFERENCE CAUSED TO APPELLANT/PETITIONER?

2. *DID THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN NOT CONSIDERING AND ACCEPTING THE FACTS*:

A. *THAT PETITIONER'S ALLEGATIONS AND CLAIMS REVEALED THAT TRIAL COUNSEL AND ALL TO HER SUBSEQUENTED APPOINTED COUNSEL(S) REFUSED OR NEGLECTED TO DO SOMETHINGS OR DID SOMETHING INEPTLY*?

B. *AND THAT PETITIONER DID SHOWED GENUINE FACTS WHERE ALL NAMED COUNSELS' PERFORMANCES MADE ERROR, OMISSIONS, AND PREJUDICED APPELLANT'S/PETITIONER'S CONSTITUTIONAL RIGHTS*?

3. *DID THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN NOT, CONSIDERING, AND ACCEPTING THE FACT THAT THE PURPOSE FOR IT AND THIS COURT TO REVIEW THESE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IS TO TREAD THE FINE, LINE BETWEEN STRATEGIC, AND TACTICAL DECISIONS VERSUS THE DEFICIENT PERFORMANCES WHICH HAVE PRIOR AND OR CURRENTLY PREJUDICED THE APPELLANT/PETITIONER BY PRIOR TRIAL COUNSEL AND OR ANY OTHER SUBSEQUENTED APPOINTED COUNSELS THAT, FAILED AND OR WILL FAIL TO RAISE ALL MERITORIOUS ISSUES AT PRETRIAL, TRIAL, POST TRIAL PROCEEDINGS, APPEAL, P.C.R.A. PROCEEDINGS, AND P.C.R.A. APPEALS*?

4. *DID THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN NOT, CONSIDERING AND ACCEPTING THE FACT THAT THE COURSE CHOSEN BY INITIAL TRIAL COUNSEL AND ALL OTHER NAMED SUBSEQUENTED APPOINTED COUNSELS HAD NO REASONABLE BASIS DESIGNED TO SERVE THE*

BEST OF INTEREST TO THE APPELLANT/PETITIONER?

A. *AND ALSO IN NOT CONSIDERING AND ACCEPTING THE FACT THAT THERE WERE NO THEORIES INVOLVED IN ALL ISSUES AND ARGUMENTS RAISED CURRENTLY ON THE INEFFECTIVENESS OF INITIAL COUNSEL AND ALL OTHER NAMED SUBSEQUENTED APPOINTED COUNSELS?*

5. DID THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN NOT, CONSIDERING AND ACCEPTING THE FACT THAT THE APPELLANT/PETITIONER DIDN'T HAVE *AN PROPER UNDERSTANDING OF TERMS OF SENTENCING (ON COURT RECORD) AND WASN'T PROPERLY ADVISED AND OR TOLD BEFORE HE AND THE COURT ACCEPTED THE PLEAD BARGAIN OF THE FOLLOWING INFORMATION UNDER PARAGRAPHS NUMBER ONE THROUGH NUMBER FOUR – "C". ON ISSUE NUMBER FIVE?*

STATEMENT OF ISSUES TO BE REVIEWED.

ISSUE NUMBER ONE.

1. THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN:

(A.) NOT CONSIDERING AND ACCEPTING THE FACT THAT, TRIAL COUNSEL AND ALL OTHER SUBSEQUENTED APPOINTED COUNSEL(S) WERE INEFFECTIVE BY NOT PRESERVING, ALL CLAIMS ON APPEAL AND POST CONVICTION RELIEF ACT PETITIONS AND APPEAL OF THE SAME.

(B.) THAT, ALL APPOINTED COUNSELS' ACTIONS AND OR NON-ACTIONS HAVE RESULTED IN A MISCARRIAGE OF JUSTICE WITH DELIBERATE INDIFFRENCE CAUSED TO APPELLANT/PETITIONER.

IN THIS SPECIFIC ISSUE THE PETITIONER/APPELLANT ARE ENTITLED AND MAY CONTEND AND RAISE APPROPRIATE FACTUAL AVERMENTS OF THE INEFFECTIVE ASSISTANCE OF PRIOR TRIAL COUNSEL OR ANY OTHER SUBSEQUENTED APPOINTED COUNSEL, IN, NOT PRESERVING THIS/AND OR ALL OTHER CLAIMS APPLICABLE ON POST TRIAL APPEAL AND POST CONVICTION RELIEF ACT PETITION(S) AND APPEALS IN WHICH HAVE RESULTED IN A MISCARRIAGE OF JUSTICE. SEE: COMMONWEALTH VS. LAWSON, 519. PA. 175, 546. A.2D. 589. (1988) WHERE THE LAW DOCTRINES PERCISELY STATES THAT "SUCCESSIVE, POST COLLATERAL PETITION IS ALLOWED, (AS APPLICABLE IN APPELLANT'S/PETITIONER'S INSTANT CASE) WHERE PETITIONER PLEADS AND DEMONSTRATES THOSE CLAIMS WOULD RESULT IN A MISCARRIAGE OF JUSTICE." *NOTE*: SEE ALSO PLEAD BARGIN COLLOQUY TRANSCRIPTS PAGES NUMBER ONE THROUGH NUMBER SEVENTY FIVE AND ALL P.C.R.A. PROCEEDINGS AND DOCKET ENTRIES ON LOWER COURT RECORD. SEE EXHIBIT(S) NUMBER(S) *ONE THROUGH FIVE*. *NOTE:* TRIAL COUNSEL AND P.C.R.A. COUNSELS FAILED TO RAISED/OR AND PROPERLY SUFFICIENTLY AND EFFECTIVELY RAISED THIS ISSUE IN AN APPROPRIATE MANNER, INWHICH WOULD HAVE BEEN THE BEST OF INTEREST TO APPELLANT/PETITIONER. *JOHN A. PACE*.

ISSUE NUMBER TWO

2. THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN NOT CONSIDERING AND ACCEPTING THE FACTS:

(A.) THAT PETITIONER'S ALLEGATIONS AND CLAIMS REVEALED THAT TRIAL COUNSEL, AND ALL OTHER SUBSEQUENTED APPOINTED COUNSEL(S) REFUSED OR NEGLECTED TO DO SOMETHING OR DID SOMETHING INEPTLY.

(B.) THAT PETITIONER DID SHOWED GENUINE FACTS WHERE ALL NAMED COUNSELS' PERFORMANCES MADE ERRORS, OMISSIONS, AND PREJUDICED TO APPELLANTS'/PETITIONER'S CONSTITUTIONAL RIGHTS.

IN THIS SPECIFIC ISSUE THE PETITIONER/APPELLANT ARE ENTITLED AND MAY, CONTEND AND RAISE APPROPIATE FACTUAL AVERMENTS THAT COUNSEL(S) REFUSED OR, NEGLECTED TO DO SOMETHING OR DID SOMETHING INEPTLY. WHERE HE HAVE SHOWN NOT, ONLY ERROR OR OMISSION BUT PREJUDICED TO PETITIONER'S RIGHTS. (AS APPLICABLE IN APPELLANT'S/PETITIONER'S INSTANT CASE). ESPECIALLY, WHERE PETITIONER'S RIGHTS WERE PREJUDICED BY PRIOR TRIAL COUNSEL AND ALL OTHER SUBSEQUENTED, APPOINTED COUNSELS IN NOT PRESERVING THIS/AND ALL OTHER CLAIMS APPLICABLE, ON POST TRIAL APPEAL AND POST CONVICTION RELIEF ACT PETITION(S) AND APPEALS. *SEE*: COMMONWEALTH VS. PIERCE, 515 PA. 153, 527, A.2d. 973. (1987), COMMONWEALTH VS. KNOX, 304 PA. SUPER. 368, 450, A.2D. 725. (1982). WHERE THE LAW DOCTRINES

PERCISELY, STATES THAT "*ALLEGATIONS WITH SUPPORTING EVIDENCE AND SHOWING PREJUDICED OF RIGHTS ARE SUFFICIENT ON P.C.R.A. PETITIONS.*" *NOTE*: SEE ALSO PLEAD BARGAIN COLLOQUY TRANSCRIPTS PAGES NUMBER ONE THROUGH SEVENTY FIVE AND ALL P.C.R.A. PROCEEDINGS AND DOCKET ENTRIES ON LOWER COURT RECORD SEE EXHIBIT(S) NUMBER(S) *ONE THROUGH FIVE. NOTE*: TRIAL COUNSEL AND P.C.R.A. COUNSELS FAILED TO RAISED/OR AND PROPERLY SUFFICIENTLY AND EFFECTIVELY RAISED THIS ISSUE IN AN APPROPRIATE MANNER IN WHICH, WOULD HAVE BEEN THE BEST OF INTEREST TO APPELLANT/PETITIONER. *JOHN A. PACE.*

ISSUE NUMBER THREE.

3. THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN NOT CONSIDERING AND ACCEPTING THE FACT THAT THE PURPOSE FOR IT AND THIS COURT TO REVIEW THESE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IS TO TREAD THE FINE LINE, BETWEEN STRATEGIC AND TACTICAL DECISIONS VERSUS THE DEFICIENT PERFORMANCES WHICH HAVE PRIOR AND OR CURRENTLY PREJUDICED THE APPELLANT/PETITIONER BY PRIOR TRIAL COUNSEL AND OR ANY OTHER SUBSEQUENTED APPOINTED COUNSELS THAT, FAILED AND OR WILL FAIL TO RAISE ALL MERITORIOUS ISSUES AT PRETRIAL, TRIAL, POST TRIAL PROCEEDINGS, APPEALS, P.C.R.A. PROCEEDINGS, AND P.C.R.A. APPEALS.

IN THIS SPECIFIC ISSUE THE PETITIONER/ APPELLANT ARE ENTITLED AND MAY CONTEND AND RAISE APPROPIATE FACTUAL AVERMENTS ON THE PURPOSE FOR THE P.C.R.A. AND THIS COURT TO REVIEW THESE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IS TO TREAD THE FINE LINE BETWEEN STRATEGIC AND TACTICAL DECISIONS VERSUS THE, DEFICIENT PERFORMANCES WHICH HAVE PRIOR AND OR CURRENTLY PREJUDICED THE APPELLANT/PETITIONER BY TRIAL COUNSEL'S AND OR ANY OTHER SUBSEQUENTED APPOINTED COUNSELS' ACTIONS OR AND NONACTIONS IN FAILURE TO RAISE ALL MERITORIOUS ISSUES AT PRETRIAL, TRIAL, POST TRIAL PROCEEDINGS, APPEALS, P.C.R.A. PROCEEDINGS, AND P.C.R.A. APPEALS. (INCLUDING THIS INSTANT CASE ENGAGING ON APPEAL) ESPECIALLY, THOSE MERITORIOUS ISSUES THAT PERTAINING TO WHERE TRIAL COUNSEL AND ALL SUBSEQUENTED APPOINTED COUNSELS FAILED TO PROPERLY, SUFFICIENTLY, AND EFFECTIVELY RAISED AND CHALLENGED THE INVALIDITY OF PETITIONER'S (APPELLANT'S GUILTY PLEAD AND ILLEGALITY OF HARSH EXCESSIVE AND UNCONSTITUTIONAL SENTENCE INPOSED, CONSEQUENTLY TO TRIAL COUNSEL'S, INCOMPETENCY, PSYCHOLOGICAL COERCION PERJURED, AND PETIT LEGAL ADVISING, MISREPRESENTATION AND ASSISTANCE OF LAW TO JOHN PACE, THE PRO SE APPELLANT/PETITIONER IN THIS INSTANT CASE ENGAGED ON APPEAL. *SEE*: HENRY VS. MISSISSIPPI, 379. U.S. 443, 85 S.CT. 564, 13 L.ED.2D. 408. (1965), COMMONWEALTH VS. McGORGAN, 449, PA. 584, 279, A.2D 456. (1972), STRICKLAND VS. WASHINGTON, 104

S.CT. 2052, 80 L.ED.2D. 674. (1984) FURTHERMORE, IN THIS INSTANT CASE NONE OF THE COUNSELS APPOINTED SUBSEQUENTLY TO TRIAL COUNSEL PER HER INEFFECTIVE PERFORMANCES CAN EXPECTED TO BE AN EFFECTIVE AND ZEALOUS ADVOCATES TO PRO SE PETITIONER/APPELLANT JOHN A. PACE. UNLESS HE/OR SHE SHOULD RAISE THE ISSUE OF, INEFFECTIVENESS OF TRIAL COUNSEL IN FAILING TO RAISE ALL MERITORIOUS ISSUES EXISTED PRIOR TO TRIAL, DURNING TRIAL AND SUBSEQUENTLY TO TRIAL PROCEEDINGS. THE PETITIONER/APPELLANT HAS REBUT THE PRESUMPTION THAT THE CONVICTION IS PROPER. THE BURDEN OF PROVING EVERY ELEMENT OF P.C.R.A. CONTENTIONS IS UPON THE, PETITIONER. HOWEVER, IT SHOULD BE RECOGNIZED THAT THE PETITIONER HAVE SHOWED THE STANDARD OF PREPONDERANCE OF EVIDENCE IN SUPPORT OF HIS CLAIMS FOR P.C.R.A. REMEDY UNDER ALLOCATE APPEAL. *SEE*: COMMONWEALTH VS. LOGAN, 468. PA. 424, 364, A.2d. 266. (1976). COMMONWEALTH VS. KNOX, 304. PA. SUPER. 368, 450. A.2d. 725. (1982), COMMONWEALTH VS. BLAIR, 274. PA. SUPER 606, 418. A.2d. 571. (1980). THE PETITIONER HAVE PERFORMED IN ALL ALLEGATIONS AND ARGUMENTS AS THE ACT, SPECIFICALLY, MANDATES, THAT ALL FACTS IS IN SUPPORT OF THE ALLEGED ERRORS OF WHICH THE PETITION(S) IS BASED AND THAT ALL SUPPORTING EVIDENCE AND AVAILABLE GROUNDS WILL BE SETFORTH. (CONSEQUENTLY, PRECISELY IN MANNER THAT HAVE BEEN PREPARED AND LITIGATED FOR, PETITIONER JOHN A. PACE, HEREIN AND HERETO THIS INSTANT ALLOCATUR NUNC PRO TUNC. PER THE LEGAL KNOWLEDGE, ADVISEMENT

AND ASSISTANCE OF MR. MACK KING. A CERTIFIED PARALEGAL FOR CONCERNED PRISONERS SEE KING JUSTICE AT S.C.I.H.) FURTHERMORE, THE PETITIONER ARE ABLE AND HAVE PROVEN THE EXISTENCE OF EXTRAORDINARY CIRCUMSTANCES TO JUSTIFY HIS FAILURE TO INITALLY RAISE THESE ISSUES, AT TRIAL, POST-TRIAL, APPEAL P.C.R.A. PETITION(S) ESPECIALLY, SINCE PETITIONER HAVE NO LEGAL KNOWLEDGE AND ARE UNINTELLIGENT TO STATUTES OF STATE AND FEDERAL COMMON LAWS, AND CONSTITUTIONS, AND CITATIONS OF CASE LAWS. IT SHOULD ALSO BE RECOGNIZED, THAT IN THIS INSTANT CASE THE TRIAL COUNSEL WERE DEFINATELY INEFFECTIVE, (AS WELL AS ALL SUBSEQUENTED COURT APPOINTED P.C.R.A. COUNSELS) INTER ALIA APPLICABLE TO TRIAL COUNSEL'S ACTIONS AND NON-ACTIONS IN NOT RAISING ALL ISSUES, WERE INITIALLY AND PRESENTLY AVAILABLE AND APPLICABLE TO APPELLANT/PETITIONER *JOHN A. PACE'S INSTANT CASE*. INWHICH DEFINATELY HAVE AND CURRENTLY PREJUDICED APPELLANT'S/PETITIONER'S CONSTITUTIONAL AND CIVIL RIGHTS (OF 13TH, 14TH ETC. AMENDMENTS) (ESPECIALLY, IF AND WHEN CONSIDERED WAIVED AND FINALLY LITIGATED UNDER THE EXTRA ORDINARY CIRCUMSTANCES EXISTED/EXISTS IN THIS INSTANT CASE, ENGAGED ON ALLOCATUR APPEAL.) *SEE*: 42 C.S.A. §9544(B), PA. C.S.A. §.9544(C). *NOTE*: SEE ALSO PLEAD BARGIN COLLOQUY TRANSCIPTS PAGES NUMBER ONE THROUGH SEVENTY FIVE AND ALL P.C.R.A. PROCEEDINGS AND DOCKET ENTRIES ON LOWER COURT, RECORD. SEE EXHIBIT(S) NUMBER(S)

ONE THROUGH FIVE. *NOTE*: TRIAL COUNSEL AND P.C.R.A. COUNSELS FAILED TO RAISED/OR AND PROPERLY, SUFFICIENTLY, AND EFFECTIVELY RAISED THIS ISSUE IN AN APPROPIATE MANNER IN WHICH WOULD HAVE BEEN THE BEST OF INTEREST TO APPELLANT/PETITIONER *JOHN A. PACE*.

ISSUE NUMBER FOUR.

4. THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN NOT CONSIDERING AND ACCEPTING THE FACT THAT THE COURSE CHOSEN BY INITIAL TRIAL COUNSEL, AND ALL OTHER NAMED SUBSEQUENTED APPOINTED COUNSELS HAD NO REASONABLE BASIS DESIGNED TO SERVE THE BEST OF INTEREST TO APPELLANT/PETITIONER.

4.A. AND ALSO IN NOT CONSIDERING AND ACCEPTING THE FACT THAT THERE WERE NO, THERIES INVOLVED IN ALL ISSUES AND ARGUMENTS RAISED CURRENTLY ON THE INEFFECTIVENESS OF INITIAL COUNSEL AND ALL OTHER NAMED SUBSEQUENTED APPOINTED COUNSELS.

IN THIS SPECIFIC ISSUE THE PETITIONER/APPELLANT ARE ENTITLED AND MAY CONTEND AND RAISE APPROPIATE FACTUAL AVERMENTS THAT THE COURSE CHOSEN BY INITIAL TRIAL COUNSEL AND ALL OTHER NAMED SUBSEQUENTED APPOINTED COUNSELS HAD NO REASONABLE BASIS DESIGNED TO SERVE THE BEST OF INTEREST TO PETITIONER/APPELLANT *JOHN A. PACE*. *SEE*: COMMONWEALTH VS. McBEE, 513, PA. 255, 520. A.2d.10 (1986), COMMONWEALTH VS.

NAUMAN, 345. PA. SUPER, 457, 498, A.2d.913. (1985), 345 PA. SUPER AT 462.A.2d. AT 915.THE PETITIONER FURTHER CONTENDS THAT HE DIDN'T MEET THE P.C.R.A. COURT'S CRITERIA OF A DISMISSAL ON P.C.R.A. PETITION(S) WITHOUT A HEARING. PARTICULARLY, SINCE HE HAVE DEMONSTRATED FROM LOWER COURTS' RECORDS INTER ALIA, A, SHOWING OF EXTRAORDINDINARY AND UNUSUAL CIRCUMSTANCES THAT PREJUDICED HIS CONSTITUTIONAL RIGHTS.THE P.C.R.A. COURT AND THE SUPERIOR COURT HAD JURISDICTION ON THIS INSTANT CASE AND APPEAL MATTER WHERE THESE COURTS COULD AND SHOULD HAVE GRANTED P.C.R.A. RELIEF TO PRO SE PETITIONER AND APPELLANT ESPECIALLY, WHERE THERE WERE NO THEORIES INVOLVED ON THE LOWER COURTS RECORDS IN THE ISSUES, EVIDENCE AND ARGUMENTS RAISED ON INEFFECTIVENESS OF TRIAL COUNSEL AND, ALL OTHER SUBSEQUENTED APPOINTED COUNSELS THAT DELIBERATELY CAUSED INDIFFRENCES TO PETITIONER/APPELLANT IN FAILING TO PRESERVED THESE FOREGOING ISSUES IN, LOWER COURT, DIRECT APPEALS, P.C.R.A. COURT, AND ON P.C.R.A. APPEALS ON THE INVALIDITY OF PLEAD BARGIN AND ILLEGALITY OF SENTENCE. SEE: 42. PA.C.S.A. §.9944(B), SEE ALSO PA.P.C.P. #353, PA.R.C.P. #320, #321(A), (B), (C). *NOTE*: SEE ALSO PLEAD BARGIN COLLOQUY TRANSCRIPTS PAGES NUMBER ONE THROUGH NUMBER SEVENTY FIVE AND ALL, P.C.R.A. PROCEEDINGS AND DOCKET ENTRIES ON LOWER COURT RECORD. SEE EXHIBIT(S), NUMBER(S). *NOTE*: TRIAL COUNSEL AND P.C.R.A. COUNSELS FAILED TO RAISED/OR AND PROPERLY, SUFFICIENTLY AND EFFECTIVELY RAISED THIS ISSUE IN AN APPROPIATE, MANNER IN

WHICH WOULD HAVE BEEN THE BEST OF INTEREST TO APPELLANT/PETITIONER, *JOHN A. PACE*.

ISSUE NUMBER FIVE.

5. THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN NOT CONSIDERING AND ACCEPTING THE FACT THAT THE APPELLANT/PETITIONER DIDN'T HAVE AN, PROPER UNDERSTANDING OF TERMS OF SENTENCING, (ON COURT RECORD) AND WASN'T PROPERLY ADUISED AND OR TOLD BEFORE HE AND THE COURT ACCEPTED THE PLEAD BARGIN OF THE FOLLOWING INFORMATION UNDER PARAGRAPHS NUMBER ONE THROUGH NUMBER FOUR-C. ON ISSUE NUMBER FIVE:

1. THAT LIFE SENTENCE WILL OR WILL NOT BE LIFE IN PRISON FOR THE REST OF HIS NATURAL LIFE. *NOTE*: SEE GUILTY PLEAD COLLOQUY TRANSCRIPTS PAGES #28 THROUGH #44. (WHERE COUNSEL KNEW OR SHOULD HAD KNOWN BEFORE GUILTY PLEAD.)

2. THAT LIFE SENTENCE WILL OR WILL NOT BE WITH PAROLE. *NOTE*: SEE GUILTY PLEAD, COLLOQUY TRANSCRIPTYS. PAGES #28 THROUGH #44. (WHERE COUNSEL KNEW OR SHOULD HAD, KNOWN BEFORE GUILTY PLEAD.)

3. THAT LIFE SENTENCE WILL BE WITH OR WITHOUT RECONSIDERATION AND MODIFICATION OF SENTENCE. *NOTE*: SEE GUILTY PLEAD COLLOQUY TRANSCRIPTS PAGES #28 THROUGH #44. (WHERE COUNSEL KNEW OR SHOULD HAD KNOWN BEFORE GUILTY PLEAD.)

4. THAT COUNSEL; A.) WILL FAIL TO PROPERLY ADVISE SUGGEST, AND REQUEST THAT DEFENDANT SHOULD WITHDRAW HIS GUILTY PLEAD IN TIMELY, OR NUNC PRO TUNC PROCEEDINGS OR AND WITHIN (10) TEN DAYS PER MOTION PETITION PLEADING. ESPECIALLY, SINCE THE COURT REFUSED TO RECONSIDER AND MODIFY THE DEGREE OF MURDER AND OR THE SENTENCE IMPOSED. SEE GUILTY PLEAD COLLOQUY TRANSCRIPTS. PAGES #72, #73. (WHERE COUNSEL KNEW OR SHOULD HAD KNOWN BEFORE/AFTER GUILTY PLEAD.)

B.) THAT COUNSEL WOULD FAIL TO CHALLENGE THE INVALIDITY OF, PLEAD AND ILLEGALITY OF THE HARSH, EXCESSIVE SENTENCE IMPOSED. (AS TO, A JUVENILE WITH FIRST MURDER OFFENSE COMMITTED WHILE DEFENDANT WERE IN A DIMINISHED STATE OF MIND THROUGH THE INFLUENCE OF DRUG AND ALCOHOL THAT CONSEQUENTED TO A, DEFICIENT UNCONSTITUTIONAL AND UNLAWFUL PLEAD BARGIN AND SENTENCE: (WHERE COUNSEL KNEW OR SHOULD HAD KNOWN BEFORE/AFTER GUILTY PLEAD.)

C.) OR THAT COUNSEL WOULD FAIL TO PROPERLY, ADVISE, SUGGEST, AND REQUEST THAT DEFENDANT SHOULD REQUEST TO DO THE SAME. (BEFORE/AFTER GUILTY PLEAD.) WITHIN A PERIOD OF (30) THIRTY DAYS. (AS TO, GUILTY PLEAD IN SPACE B) (WHERE COUNSEL KNEW OR SHOULD HAD KNOWN BEFORE/AFTER GUILTY PLEAD.) *NOTE*: SEE, GUILTY PLEAD COLLOQUY TRANSCRIPTS PAGE #71 THROUGH 75. ESPECIALLY, SINCE, THE COURT DIRECTED COUNSEL TO TAKE AN TIMELY APPEAL. (AS TO, SPACES B. ANDC.) SEE

PAGE #73. *NOTE*: SEE PAGES #28 THROUGH #67. GUILTY PLEAD ACCEPTED AND ENTERED BY THE DEFENDANT. SEE ALSO PAGES #67 THROUGH #75. GUILTY PLEAD ACCEPTED AND SENTENCING, BY THE COMMON PLEAS COURT. BEFORE HONORABLE DAVID N. SAVITT, TRIAL/PLEAD BARGIN, COLLOQUY JUDGE IN COURTROOM #602 CITY HALL PHILADELPHIA, PENNSYLVANIA. 19107. ON FEBRUARY 13, 1986. RE: COMMONWEALTH VS. JOHN A. PACE. OCTOBER TERM. 1985. ON BILL NO. (S) 1272-1275. IN THIS INSTANT CASE AT TRIAL THE OTHER APPEARANCES WERE: CHARLES GALLAGER ESQUIRE. ASSISTANT DISTRICT ATTORNEY FOR THE COMMONWEALTH, MOIRA D. DUNWORTH ESQUIRE FOR THE DEFENDANT. THE AUTHORITY AND JURISDICTION OF, THE COURT FOR THIS INSTANT CASE ARE IN COMMONWEALTH -V- RUSH, 281. PA. SUPER 92. (1980), COMMONWEALTH -V- COLE, 434. PA. 288, 263. A.2d. 339. (1970), IN RUSH IS TO RECONSIDER AND MODIFY THE SENTENCE TIMELY OR NUNC PRO TUNC. IN COLE IS THE COURT'S INHERENT POWER TO CORRECT AN, ILLEGAL HARSH, EXCESSIVE SENTENCE OR OBVIOUS PATENT MISTAKES IN IT'S ORDERS AND PROCEEDINGS AT ANY TIME. SEE PA.R.C. P. #1405, #1410, #1501. SEE ALSO TITLE 42. PA.C.S.A. §.9944(B), PA.R.C.P. #353, PA.R.C. P. #320, #321(A),(B),(C). TITLE 42 PA.C.S.A. §.9541-9551. (STATE COURT'S JURISDICTION FOR RELIEF UNDER POST CONVICTION HEARING ACT IN PURDON'S 1982) TITLE 42. PA. C.S.A. §.724(A) (SUPREME COURT'S JURISDICTION) FURTHER, THE LAW DOCTRINES STATED THAT DUE PROCESS REQUIREMENTS INTER ALIA ARE NOT MET UNLESS A GUILTY PLEAD IS, MADE VOLUNTARILY WITH KNOWLEDGE AND

INTELLIGENCE OF DEFENDANT AFTER BEING PROPERLY ADVISED AND WITH FULL UNDERSTANDING OF THE CONSEQUENCES OF PENALTY, OF CRIMINAL CHARGES. A REAL NOTICE OF THE TRUE NATURE OF THE CHARGE(S) IS, INDISPENSIBLE TO A VALID GUILTY PLEAD. IF, (AS IN, PETITIONER'S INSTANT CASE) THE GUILTY PLEAD COLLOQUY DOES NOT REFLECT A VOLUNTARY PLEAD, THE COURTS ARE BOUND, BY FEDERAL AND STATE LAWS AND CONSTITUTIONS TO REVERSE THE CONVICTION, (JUDGMENT ON PLEAD AND SENTENCE) AND REMAND FOR A NEW TRIAL, NEW PLEA BARGIN COLLOQUY OR RESENTENCE TO A PROPER AND LESSER DEGREE OF CHARGE(S) AND SENTENCE(S) SEE BOYKIN -V- ALABAMA; 395. U.S. 238,89. S.CT. 1709. (1969), UNITED STATES EX REL CROSBY -V- BRIERLEY 404. F.2d. 790. (3Rd. CIR. PHILA. 1968), COMMONWEALTH -V- RODGERS 465. PA. 379, 35O. A.2d. 815. (1976), U.S.C.A. CONST. AMENDS 1,5,6,8, AND 14. AND PA.R. CRIMINAL PROCEDURE RULE #319. THE PENNSYLVANIA SUPREME COURT'S SIX(6) MANDATORY AREAS OF INQUIRY WHICH THE COURT(S) SHOULD ASCERTAINED THE DEFENDANT JOHN, PACE'S KNOWLEDGE AND UNDERSTANDING OF HIS GUILTY PLEAD, TO SUPPORT A ESTABLISHED CONSTITUTIONAL VALID PLEA OF GUILTY IN HIS PLEAD BARGIN COLLOQUY. ARE IN COMMONWEALTH -v- WILLIS, 471. PA. 50, 369. A.2d. 1189. (1977). SEE ALSO THE DEFENDANTS/ APPELLANT'S ANSWERS THAT WERE AS FOLLOWS:

(1) DOES THE DEFENDANT UNDERSTAND THE NATURE OF THE CHARGES TO WHICH HE IS, PLEADING GUILTY? (NO) HE DIDN'T KNOW THAT

SECOND DEGREE MURDER CHARGE WOULD BE CONSEQUENTED TO A PENALTY OF HIS NATURAL LIFE IN CARCERATED.

(2.) (YES) THERE WERE A FACTUAL BASIS FOR THE PLEAD, TO GET A LESSER SENTENCE THAN NATURAL LIFE IN PRISON.

(3.) (YES) DEFENDANT UNDERSTOOD HE HAD A RIGHT TO A TRIAL BY JURY. BUT CHOOSE TO, PLEAD GUILTY FOR A LESSER SENTENCE THAN NATURAL LIFE IN PRISON.

(4.) (YES) DEFENDANT UNDERSTOOD HE PRESUMED INNOCENT UNTIL PROVEN GUILTY BUT CHOOSE TO PLEAD GUILTY FOR MERCY OF THE COURT FOR A LENIENT SENTENCE THAN LIFE IN PRISON FOR HIS NATURAL LIFE.

(5.) (NO) DEFENDANT WERE NOT A WARE PRIOR TO PLEAD THAT THE PERMISSIBLE RANGE, OF (2ND.) SECOND DEGREE MURDER WOULD CARRY A MANDATORY SENTENCE OF LIFE IN PRISON FOR THE REST OF HIS NATURAL LIFE.

(6.) (YES) DEFENDANT WERE AWARE THAT THE JUDGE WERE NOT BOUND BY TERMS OF ANY, PLEAD AGREEMENT FOR THE OFFENSE CHARGED. HOWEVER, THE JUDGE ACCEPTED THE GUILTY PLEAD BUT DIDN'T OFFERED ANY BARGIN AS TO, A MORE LENIENT SENTENCE THAN NATURAL LIFE. DUE TO COUNSEL'S INCOMPETENCY PSYCHOLOGICAL COERCION, PERJURED, AND PETIT LEGAL ADVISING AND ASSISTANCE TO DEFENDANT THAT PURSUED HIM TO ACCEPT A, GUILTY PLEAD BARGIN (WITHOUT LENIENT AGREEMENT) TO A

2ND. DEGREE MURDER CHARGE INSTEAD OF A LESSER DEGREE OF MURDER CHARGE AND LENIENT PENALTY TO BE CONSIDERED AND POSSIBLY ACCEPTED BY THE TRIAL JUDGE PRESIDING AT THE PLEAD BARGIN, COLLOQUY.

FOOT NOTE:

ALL SAID PETITIONER'S INSTANT ALLEGATIONS AND MERITORIOUS CLAIMS ARE BASED, UPON GENUINE MATERIAL FACTS AND ARE SUPPORTED BY STATE AND FEDERAL STATUTES LAWS, CONSTITUTIONAL LAWS AND PRESIDING. AUTHORITIES CASE LAWS INWHICH PETITIONER/APPELLANT ARE SEEKING AN EFFECTUATE APPEAL AND P.C.R.A. REMEDY. ESPECIALLY, WHERE THE SUPERIOR COURT JUDGES' PANEL THROUGH SUSMISSION OF THEIR OPINIONS DID INDEED OVERLOOKED FAILED TO RECONSIDERED AND DIDN'T ACCEPTED THE FACT THAT TRIAL COUNSEL'S AND OR ALL SUBSEQUENTED P.C.R.A. APPOINTED COUNSELS' AND OR, TRIAL JUDGES' AND OR MOTION JUDGES' ACTIONS AND NON-ACTIONS DID CONSEQUENTED TO A DENIAL OF: 1.) PROPER ACCESS ACCESS TO COURT., 2.) DUE PROCESS., 2.) EQUAL, PROTECTION REMEDY., 4.) FAIL AND IMPARTIAL TRIAL AND OR EFFECTIVE ASSISTANCE OF, TRIAL COUNSEL., 5.) AND DEPRIVED THE PETITIONER/APPELLANT OF THE SAFEGARD FROM: A.) MISCARRIAGE OF JUSTICE., B.) PREJUDICED TO CONSTITUTIONAL RIGHTS., C.) AND CRUEL UNUSUAL PUNISHMENT. (PER AN UNLAWFUL AND UNCONSTITUTIONAL PLEAD BARGIN, COLLOQUY AND SENTENCE IMPOSED) THEREFORE, FOR ALL THE AFOREMENTIONED REASONS, ALLEGATIONS,

AND MERITORIOUS CLAIMS HEREIN, THIS INSTANT CASE MUST BE CONSIDERED AS EXTRAORDINARY AND DEVASTATING CIRCUMSTANCES TO PETITIONER/APPELLANT *JOHN A. PACE.* (ON MENTALLY, PHYSICALLY SPIRITUALLY, AND LEGALLY BASIS). *NOTE*: SEE ALSO PLEAD BARGIN COLLOQUY TRANSCRIPTS PAGES NUMBER *ONE* THROUGH NUMBER *SEVENTY FIVE*. AND ALL P.C.R.A. PROCEEDINGS AND DOCKET ENTRIES ON LOWER COURT, RECORD. SEE EXHILIT(S) NUMBER'S *ONE THROUGH FIVE*. *NOTE*: TRIAL COUNSEL AND P.C.R.A. COUNSELS FAILED TO RAISED/OR AND PROPERLY SUFFICIENTLY AND EFFECTIVELY RAISED THIS ISSUE IN AN APPROPIATE MANNER INWHICH WOULD HAVE BEEN THE BEST OF INTER-EST TO APPELLANT/PETITIONER *JOHN A. PACE.*

CONCLUSION

THEREFORE, FOR ALL THE FOLLOWING REASONS YOUR PETITIONER/APPELLANT *JOHN A. PACE.*, HEREBY INVOKE THIS HONORABLE COURT TO GRANT THE FOLLOWING REMEDIES:

1. (X) THAT THE COMMONWEALTH'S MOTION TO DISMISS THE DEFENDANT'S ALLOCATUR, PETITION FOR P.C.R.A. RELIEF WILL BE DENIED WITH AN ESTOPPEL AGAINST COMMONWEALTH. (AS TO THIS INSTANT CASE AND MATTER, SEE PARAGRAPHS # 4 and # 5.

2. (X) THAT THE RELIEF SEEKED WILL BE GRANTED WITHOUT A REMAND FOR A HEARING SEE PA.R.C.P. #1507(B) WITH RESJUDICATA ON

BEHALF OF PETITIONER/APPELLANT. SEE ALSO, PARAGRAPHS #4 AND #5.

3. (X) OR THAT THE RELIEF SEEKED WILL BE CONDUCTED WITH A REMAND AND EVIDENTIARY HEARING TO ADDRESS THE CLAIMS IN PETITIONER'S/APPELLANT'S P.C.R.A. PETITION FOR RELIEF. SEE: PA,R.C.P. #1508(A) WITH RESJUDICATA ON BEHALF OF PETITIONER/APPELLANT. SEE ALSO PARAGRAPHS #4 AND #5.

4. (X) IT IS FURTHER ORDERED AND DECREED THAT THE SUPREME COURT WILL PLACE A, STAY ON JUDGMENT AND REMAND THIS CASE TO LOWER COURT FOR RESENTENCING TO A, LESSER SENTENCE OF A 3RD. DEGREE MURDER CHARGE. WITH RESJUDICATA ON BEHALF OF, PETITIONER/ APPELLANT FOR RELIEF SEEKED.

5. (X) OR IT IS FURTHER ORDERED AND DECREED THAT THE SUPREME COURT WILL VACATE, THE JUDGMENT AND REMAND THIS CASE TO LOWER COURT TO ENTER A NEW VALID GUILTY PLEAD BARGIN WITH A LESSER AND LENIENT SENTENCE. (OF 3RD DEGREE OR LESSER SENTENCE) WITH RESJUDICATA ON BEHALF OF PETITIONER/ APPELLANT FOR RELIEF SEEKED.

RESPECTFULLY SUBMITTED,

/S/John A. Pace
JOHN A. PACE., #AY-6445.
S.C.I.H., P.O. DRAWER R,
HUNTINGDON, PA. 16652

NOTICE:

ALL THE FOREGOING ALLEGATIONS AND LITIGATIONS PREPARED HEREIN, (BY MARK, KING., A CERTIFIED PARALEGAL) ARE IN CONFORMITY WITH PA. BAR RULE #371. (SAVING, PROVISION FOR CERTIFIED PARALEGALS PER PA.BAR LICENSED ATTORNEYS) AND THROUGH APPROVAL OF PENNSYLVANIA BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF PA. AND AMERICAN BAR ASSOCIATION CONSTITUTION AND BYLAWS FOR PARALEGALS/LEGAL ASSISTANT ASSOCIATES (THAT SERVE IN THE LEGAL PROFESSION)

[EXHIBITS OMITTED]

IN THE SUPREME COURT OF PENNSYLVANIA.,
EASTERN DISTRICT PHILADELPHIA.

COMMONWEALTH OF PENNSYLVANIA.	:	
	:	SUPREME COURT NO.
APPELLEE	:	
	:	1992.
-v-	:	COMMON PLEAS COURT
JOHN A. PACE.	:	NO. 1272-1275 OCT. 1985.
	:	
APPELLANT.	:	

PROOF OF SERVICE.

I HEREBY CERTIFY THAT I AM THIS 26th DAY OF June 1992, SERVING THE FOREGOING BRIEF UPON PERSON AND IN MANNER INDICATED BELOW WHICH SERVICE SATIFY THE REQUIREMENTS OF PA. R.A.P. #121. BY FIRST CLASS U.S. MAIL TO:

DISTRICT ATTORNEY
OF PHILADELPHIA.
LYNNE ABRAHAM.
-DISTRICT ATTORNEY
PHONE NO.#(215)686-8000
APPEALS UNITS.
1421 ARCH STREET.
PHILADELPHIA,PA.19102
ATTENTION:
DONNA G. ZUCKER,
DEPUTY CHIEF/D.A.

/S/John A. Pace
JOHN A. PACE., AY-6445
S.C.I.H.
P.O. DRAWER R,
HUNTINGDON, PA. 16652

[LOGO] DISTRICT ATTORNEY'S OFFICE
1421 ARCH STREET
PHILADELPHIA, PENNSYLVANIA 19102
686-8000

LYNNE ABRAHAM
DISTRICT ATTORNEY

July 13, 1992

Charles W. Johns, Esquire
Prothonotary, Supreme Court of Pennsylvania
Room 468 City Hall
Philadelphia, Pennsylvania 19107

Re: **Commonwealth v. John A. Pace**
No. 81 E.D. Miscellaneous Docket 1992

Dear Mr. Johns:

Defendant has filed a Petition for Allowance of Appeal Nunc Pro Tunc from the Superior Court's March 30, 1992 affirmance of his convictions for murder and possessing an instrument of crime. Defendant had thirty days from that date to petition for allowance of appeal. Pa.R.A.P. 1113(a). As an appellate court may not enlarge the time for filing a petition for allowance of appeal, Pa.R.A.P. 105(b), defendant's petition must be dismissed. At this point, defendant's only vehicle for relief, if any, is pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §9541 *et seq*.

In any event, defendant's petition for allowance of appeal presents no issues that warrant this Court's review. Other than some vague claims of ineffectiveness, which fail to specify any particular action that counsel did or did not take, the issues raised in the petition are adequately disposed of in the Commonwealth's brief, a copy of which

is enclosed for the Court's convenience, and the opinions below.

Very truly yours,

/s/ Frances Gralnek Gerson
FRANCES GRALNEK GERSON
Assistant District Attorney

/jnj

cc: John A. Pace (Pro Se)

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	NO. 81
v.	:	E.D. MISCELLANEOUS
JOHN A. PACE	:	DOCKET 1992

PROOF OF SERVICE

I hereby certify that I am on this day serving the attached document upon the person(s) and in the manner indicated below which service satisfies the requirements of Pa.R.A.P. 121:

SERVICE BY FIRST CLASS MAIL ADDRESSED AS FOLLOWS:

JOHN A. PACE AY-6445
S.C.I.H.
P.O. DRAWER R
HUNTINGDON, PA. 16652

Date: 7/13/92

/s/ Frances Gralnek Gerson
FRANCES GRALNEK GERSON, ESQUIRE
Attorney Identification No. 33469
1421 Arch Street
Philadelphia, Pa. 19102
Counsel for District Attorney
of Philadelphia County
(215) 686-5728

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PENNSYLVANIA.	:	
v.	:	No. 81 E.D. Misc. Dkt. 1992
JOHN A. PACE.	:	
Petitioner	:	

ORDER

PER CURIAM:

AND NOW, this 3rd day of September, 1992, the Petition for Permission to File Petition for Allowance of Appeal Nunc Pro Tunc is denied and the Motion for Leave to File Reduced Copies is dismissed.

IN THE COURT OF COMMON PLEAS FOR THE COUNTY OF PHILADELPHIA, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Respondent

v.

JOHN ALLEN PACE,
Petitioner

PETITION UNDER THE POST CONVICTION RELIEF ACT

Post Conviction appeal from the judgement of sentence entered February 13, 1986, by the Court of Common Pleas of Philadelphia County, Pennsylvania, October Term, No. 1272-1275.

John Allen Pace
1100 Pike Street, AY6445
Huntingdon, PA 16654

Pro Se

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
v.	:	OF PHILADELPHIA
JOHN ALLEN PACE,	:	COUNTY, PENNSYLVANIA
Defendant	:	Criminal Division
	:	Docket No.: 1272-1275
	:	October Term, 1985

MOTION FOR APPOINTMENT OF COUNSEL AND LEAVE TO PROCEED IN FORMA PAUPERIS

_____ Petitioner and Defendant in the above-captioned matter, hereby petitions this Honorable Court for appointment of counsel to assist Petitioner in the

furtherance of an appeal under the Post Conviction Relief Act and Chapter 1500, Pennsylvania Rules of Criminal Procedure. To avoid conflict of interest arising from included allegations of ineffectiveness of counsel, Petitioner further requests that appointed counsel not be affiliated with the office(s) or firm(s) of previous counsel in this matter.

Inasmuch as he is unable to retain counsel or to pay the fees and costs of an appeal, as certified in the attached Verified Statement, Petitioner moves this Honorable Court for leave to proceed *in forma pauperis* in furtherance of his petition under the Post Conviction Relief Act.

Respectfully submitted,

_____ /S/ _____

Date

John A. Pace
1100 Pike Street, AY6445
Huntingdon, PA 16654

COMMONWEALTH OF PENNSYLVANIA Respondent v. JOHN ALLEN PACE, Defendant	: : : : : : :	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA Criminal Division Docket No.: 1272-1275 October Term, 1985

VERIFIED STATEMENT

_____ Petitioner and Defendant in the above-captioned matter, states under penalties provided by 18 Pa.C.S. §4904 that:

1. I am the petitioner in the above-captioned action and because of my financial condition, I am unable to pay the following fees and costs:

(a) retention of counsel.

(b) costs of producing transcripts and records;

(c) other fees and costs associated with this appeal.

2. The following statements relating to my ability to pay the fees and costs of prosecuting this appeal are true and correct:

(a) I am not presently employed except for a prison industries job;

(b) I have received no income within the past twelve months other than my prison wages;

(c) I have $___ in my prison account.

Respectfully submitted,

_____ /S/ _____

Date

John A. Pace
1100 Pike Street, AY6445
Huntingdon, PA 16654

COMMONWEALTH OF PENNSYLVANIA v. JOHN ALLEN PACE, Defendant	: : : : : : :	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA Criminal Division Docket No.: 1272-1275 October Term, 1985

MOTION UNDER THE POST CONVICTION RELIEF ACT

THE HONORABLE, THE JUDGES OF THE COURT:

The Motion of John Allen Pace ("Defendant"), pro se, respectfully represents:

1. Defendant's name is John Allen Pace, Parole Number 8358S.

2. Defendant presently is confined at the State Correctional Institution at Huntingdon, Pennsylvania.

3. Defendant was sentenced for the offenses of Murder of the second degree and possession of an instrument of crime.

4. Defendant was sentenced on February 13, 1986.

5. Defendant was convicted following a guilty plea.

6. Defendant is now serving the sentence imposed at Docket No. 1272-1275, October term, 1985, at a total term of confinement of life with no stated minimum sentence for parole eligibility.

7. Defendant was sentenced by the Honorable David N. Savitt, who presided at both the receipt of the guilty plea and sentencing.

8. Defendant had instituted the following proceedings (listed by the court, caption, term and number) which have been completed, to obtain relief from his sentence:

(a) Court of Common Pleas of Philadelphia County, Commonwealth of Pennsylvania v. John Allen Pace, 1986, No. 1272-1275, October Term, 1985, – Petition for relief under the Post Conviction Hearing Act; denied.

(b) Superior Court of Pennsylvania, Commonwealth of Pennsylvania, 1991, No. 02429 Philadelphia – Appeal of Denial of Petition under Post Conviction Hearing Act; denial affirmed.

(c) Supreme Court of Pennsylvania, Commonwealth of Pennsylvania, 1992, No. 81 E.D. Misc. Dkt. – Petition for Permission to File Petition for Allowance of Appeal Nunc Pro Tunc; petition denied.

9. Defendant was represented by the attorneys listed below, with the stage of the case in which each represented Defendant indicated.

Moira Dunworth, Esquire – arrest through sentencing.

Franklin D. Green, Esquire – first Post Conviction Hearing Act; withdrew representation for personal reasons while motion was being held under advisement.

David Rudenstein, Esquire – appointed after Attorney Green withdrew; represented Defendant through appeal to Superior Court.

10. Defendant respectfully requests that he be granted the following relief:

(a) withdrawal of the unconstitutionally-induced guilty pleas;

(b) an evidentiary hearing;

(c) correction of the sentence of life imprisonment so as to include an explicit minimum term that will engender parole eligibility.

11. The grounds for the relief requested by Defendant, as set forth in Paragraph 10, are as follows:

(a) The pleas of guilty to Murder of the second degree and Possession of an instrument of crime were unlawfully induced by circumstances that make it clear that the inducement caused Defendant to plead guilty. Neither the court nor counsel ensured that Defendant understood that a consequence of his plea could or would be imposition of that term of life imprisonment without a minimum sentence for parole eligibility. Germanely, Defendant is factually innocent of post-1982 first or second degree *arson*-murder, which is the sole offense under state penal statutes for which life imprisonment without parole eligibility is authorized;

(b) An unlawful sentence of life imprisonment without a discretionary minimum sentence for parole eligibility was imposed upon Defendant;

(c) The failure to litigate these issues during the colloquy procedures or on appeal could not have been the result of any strategic or tactical decision by counsel, thus denying Defendant effective assistance of counsel at all levels of representation; in the alternative, the Superior Court did not determine until 1992, in a case characterized as one of "first impression," that a sentence of life imprisonment is a mandatory minimum, thus precluding a challenge to that holding prior to 1992. Ineffective assistance of counsel, in the circumstances of the instant case, so undermined the truth determining process that no reliable adjudication of the guilt or innocence of the Defendant could have taken place;

(d) Violations of the Constitution of Pennsylvania, the laws of the Commonwealth, and the Constitution of the United States, in the circumstances of this particular case, so undermined the truth determining process that no reliable adjudication of guilt or innocence, nor fairness in sentencing could have taken place, and these violations would require the granting of federal habeas corpus relief; and

(e) Supplemental grounds that may be added in the interest of justice subsequent to the advice of appointed counsel.

12. The facts supporting each ground for the relief requested by Defendant are listed below:

i. The following facts supporting a ground for relief appear in the record:

Defendant entered a plea of guilty in open court to the charges of second degree murder and possession of an instrument of crime. Defendant subsequently received a life sentence without a stated minimum sentence for parole eligibility. Both the court and trial counsel failed to ascertain on the record whether Defendant understood the nature and consequences of his guilty plea.

ii. The following facts supporting a ground for relief don't appear in the record but are evidenced by documents attached to the instant Motion as Exhibits:

Prior to Defendant entering his guilty plea, counsel Dunworth met with Defendant's biological parents and brother to discuss the Defendant's case and secure the family's support, since the Defendant was still a juvenile. Attorney Dunworth informed Defendant's family that it

was her professional opinion that the Defendant should plead guilty to second degree murder. Attorney Dunworth also informed the family that the Defendant would have to serve up to ten years before he would be eligible for parole. Based on their understanding of counsel's statements, the family advised the Defendant to plead guilty to second degree murder. [See Affidavits at Exhibits A, B and C].

That counsel misinformed both the Defendant and his family is further substantiated in a letter the Defendant received from his PCRA counsel, David Rudenstein, wherein Attorney Rudenstein states that, ". . . your prior counsel admitted to me on the telephone that she did not explain Life was Life without parole simply because she had a very difficult emotional time dealing with such a prospect for you and your family." [See Exhibit D] At the March 26, 1991, PCHA evidentiary hearing, Defendant asked Attorney Rudenstein to call trial counsel Dunworth to the stand and ask her why she misled him and his family about the possibility of parole, but Attorney Rudenstein did not call her.

Guilty plea counsel Dunworth was ineffective for failing to explain the consequences of Defendant's guilty plea and for failing to challenge the legality of a life sentence without a stated minimum sentence for parole eligibility. PCRA and Superior Court counsels Franklin D. Green and David Rudenstein were ineffective for failing to raise these issues and for failing to raise guilty plea counsel Dunworth's ineffectiveness for failing to raise these issues on direct appeal.

13. The issues raised in this Motion have not been fully litigated or waived for the following reasons:

Defendant never had the requisite knowledge to execute a voluntary waiver of the issues or to litigate the issues prior to this time. The Superior Court and Supreme Court of Pennsylvania have not ruled on the merits of these issues. Extraordinary circumstances, including the denial of effective assistance of counsel, exist that justify Defendant raising these issues at this time. This motion should not be dismissed without a hearing for the reason that the issues raised in this motion were never raised in Defendant's first PCRA petition and Defendant has alleged the ineffectiveness of all prior counsel for failing to raise the issues contained in this motion, thus alleging extraordinary circumstances to justify failure to raise the issues prior to the present. Thus such issues have not been waived.

The course of actions and omissions by Defendant's three previous counsel had absolutely no reasonable basis designed to promote Defendant's interest. A grave miscarriage of justice occurred when Defendant pleaded guilty believing that, by doing so, he would be eligible for parole some day.

A sentence of life imprisonment without a stated minimum sentence for parole eligibility imposes an unlawful sentence and constitutes cruel and unusual punishment, as well as denies due process and equal protection of law in violation of the Constitution of the United States and Pennsylvania, thus creating fundamental and manifest error. U.S. Const. amends. VI and XIV; Pa. Const. Art. 1, §9.

Defendant's right to a trial by jury secured by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 6 and 9, of the Pennsylvania Constitution, was violated when Defendant

entered his plea of guilty unknowingly, unintelligently, involuntarily, and without a full understanding of the rights he was waiving.

Trial counsel was constitutionally ineffective for failing to insure that Defendant understood the consequences of his pleading guilty to second degree murder, to challenge the legality of the life sentence that was given without a stated minimum sentence for parole eligibility, and to file a motion to withdraw the plea based on these issues, thereby depriving Defendant of his right to effective assistance of counsel secured by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Pennsylvania Constitution. Such ineffective assistance of counsel so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.

PCRA counsel Franklin Green was constitutionally ineffective for failing to raise the issues set forth in the instant PCRA Motion, and raise trial counsel's ineffectiveness for failing to raise these issues on direct appeal. Replacement PCRA counsel Rudenstein likewise was constitutionally ineffective for failing to raise the issues set forth in the instant PCRA Motion, to call Attorney Dunworth to testify at the evidentiary hearing when he knew, first hand, that Attorney Dunworth had failed to inform Defendant that his pleading guilty to a life sentence would mean that he would never be eligible for parole, and to raise Attorney Green's and Dunworth's ineffectiveness for failing to raise these issues. All three of Defendant's prior counsel deprived him of his right to effective assistance of counsel secured by the Sixth and

Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Pennsylvania Constitution.

WHEREFORE, Defendant respectfully requests that this Honorable Court grant this Motion for the relief requested in Paragraph 10, *supra*.

Respectfully submitted,
/s/ John A. Pace
John A. Pace, Pro se
1100 Pike Street, AY6445
Huntingdon, PA 16654

VERIFICATION

I, JOHN ALLEN PACE, do hereby verify that the facts sets forth in the above motion are true and correct to the best of my personal knowledge or information and belief, and that any false statements herein are made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.S. §4904), relating to unsworn falsification to authorities.

/s/ John A. Pace
John Allen Pace
1100 Pike Street, AY6445
Huntingdon, PA 16654

EXHIBIT A

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA
v.	:	
JOHN ALLEN PACE, Defendant	:	Criminal Division
	:	Docket No.: 1272-1275 October Term, 1985

AFFIDAVIT

Commonwealth of Pennsylvania	:	
	:	ss
County of Philadelphia	:	

I, DOROTHY CLEMMONS, hereby certify that:

1. I am the biological mother of John Allen Pace, and I reside at 6125 Yocum Street, Philadelphia, Pennsylvania, 19143.

2. Between October and February of 1985-86, I met with my son's attorney, Ms. Moira Dunworth, Esquire, 1422 Chestnut Street, Suite 709, Philadelphia, Pennsylvania, to discuss my son's criminal case in the above captioned matter.

3. Because my son was a juvenile at the time, Attorney Dunworth was consulting with me to determine what was best for my son. It was during one of these meetings that Attorney Dunworth advised me that she wanted my son to plead guilty to second degree murder and asked me to talk to my son and convince him that this was the best route for him to take.

4. Attorney Dunworth also informed me that if my son pleaded guilty to second degree murder, he would be out of prison in ten years.

5. Because I believed Attorney Dunworth's statement that my son would get released after ten years if he pleaded guilty to the second degree murder charge, I advised my son to enter the guilty plea which he subsequently did.

/s/ Dorothy Clemmons
Dorothy Clemmons

I, DOROTHY CLEMMONS, do hereby verify that the facts set forth in the above Affidavit are true and correct to the best of my knowledge, information and belief. I realize that any false statements contained in this Affidavit are made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.s. §4904), relating to unsworn falsification to authorities.

11/6/96
Date

/s/ Dorothy Clemmons
Dorothy Clemmons

EXHIBIT B

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA
v.	:	
JOHN ALLEN PACE, Defendant	:	Criminal Division
	:	Docket No.: 1272-1275 October Term, 1985

AFFIDAVIT

Commonwealth of Pennsylvania :
: ss
County of Philadelphia :

I, MORRIS CLEMMONS, hereby certify that:

1. I am the biological father of John Allen Pace, and I reside at 1537 N. 54 Street, Philadelphia, Pennsylvania, 19131.

2. Between October and February of 1985-86, I met with my son's attorney, Ms. Moira Dunworth, Esquire, 1422 Chestnut Street, Suite 709, Philadelphia, Pennsylvania, to discuss my son's criminal case in the above captioned matter.

3. Because my son was a juvenile at the time, Attorney Dunworth was consulting with me to determine what was best for my son. It was during one of these meetings that Attorney Dunworth advised me that she wanted my son to plead guilty to second degree murder and asked me to talk to my son and convince him that this was the best route for him to take.

4. Attorney Dunworth also informed me that if my son pleaded guilty to second degree murder, he would be out of prison in ten years.

5. Because I believed Attorney Dunworth's statement that my son would get released after ten years if he pleaded guilty to the second degree murder charge, I advised my son to enter the guilty plea which he subsequently did.

I, MORRIS CLEMMONS, do hereby verify that the facts set forth in the above Affidavit are true and correct to the best of my knowledge, information and belief. I realize that any false statements contained in this Affidavit are made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.s. §4904), relating to unsworn falsification to authorities.

11/6/96 /s/ Morris Clemmons
Date Morris Clemmons

EXHIBIT C

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA
v.	:	
JOHN ALLEN PACE, Defendant	:	Criminal Division
	:	Docket No.: 1272-1275 October Term, 1985

AFFIDAVIT

Commonwealth of Pennsylvania :
: ss
County of Philadelphia :

I, HUGH PACE, hereby certify that:

1. I am the biological brother of John Allen Pace, and I reside at 5915 Baynton Street, Philadelphia, PA 19144.

2. Between October and February of 1985-86, I, along with my parents, met with my brother's attorney,

Ms. Moira Dunworth, Esquire, 1422 Chestnut Street, Suite 709, Philadelphia, Pennsylvania, to discuss my brother's criminal case in the above captioned matter.

3. Because my brother was a juvenile at the time, Attorney Dunworth was consulting with my parents and me to determine what was best for my brother. It was during one of these meetings that Attorney Dunworth advised me that my brother should plead guilty to second degree murder. Attorney Dunworth asked us to talk to my brother and convince him that this was the best route for him to take.

4. Attorney Dunworth also informed me that if my brother pleaded guilty to second degree murder, he would be out of prison after ten years.

5 Because my parents and I believed Attorney Dunworth's statement that my brother would be eligible for parole sometime after serving ten years if he pleaded guilty to the second degree murder charge, I, along with my parents, advised my brother to enter the guilty plea which he subsequently did do.

11/5/96 /s/ Hugh D. Pace
Date Hugh Pace

I, HUGH PACE, do hereby verify that the facts set forth in the above Affidavit are true and correct to the best of my knowledge, information and belief. I realize that any false statements contained in this Affidavit are made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.s. §4904), relating to unsworn falsification to authorities.

11/6/96 /s/ Hugh D. Pace
Date Hugh Pace

EXHIBIT D

David S. Rudenstein
Attorney At Law

[Address Omitted In Printing]

May 21, 1990

PLEASE RESPOND TO:

Mr. John Pace
AY-6445
Box 200
Camp Hill, PA 17001-0200

RE: Commonwealth vs. Pace

Dear Mr. Pace:

Please be advised that I am in receipt of your letter, dated May 5, 1990. I have reviewed the issues raised there in and I do think that I have raised these issues with the P.C.R.A. Court, but, at the same time, I just hope that I have not misunderstood anything in your letter. Basically, the main issue that I have raised with the P.C.R.A. Court was that your plea was not voluntary or knowing because it was never explained to you that Life in Pennsylvania meant Life without parole.

There were also other issues that I would have liked to have placed on the record via an evidentiary hearing, to wit, your prior counsel admitted to me on the telephone that she did not explain Life was Life without parole simply because she had a very difficult emotional time dealing with such a prospect for you and your family. However, because Judge McCrudden denied me an evidenciary hearing, this is not of record.

I am sure the Judge will be denying our petition, thereafter, I will file notice of appeal to Superior Court raising the issues I have raised in the P.C.R.A. petition and will of course, also ask for an evidenciary hearing.

Thank you.

Very truly yours,

/s/ David Rudenstein
David Rudenstein

DSR/mer

COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	Criminal Division
	:	Docket Nos.: 1272-1275
v.	:	October Term, 1985
JOHN ALLEN PACE, Defendant	:	

MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT'S
MOTION UNDER POST CONVICTION RELIEF ACT

John Allen Pace 1100
Pike Street, AY6445
Huntingdon, PA 16654
Pro Se

I. *TERMS OF LIFE IMPRISONMENT IMPOSED WITHOUT A DISCRETIONARY MINIMUM TERM FOR PAROLE ELIGIBILITY FOR CRIMES EXCEPT FIRST AND SECOND DEGREE ARSON-MURDER ARE ILLEGAL.*

Limited solely to sentence rather than conviction, this issue is a challenge to the legality and constitutionality of the mandatory sentence imposed and, therefore, could not have been waived. 42 Pa.C.S.A. §9781; *Commonwealth v. Campbell*, 351 Pa.Super. 56, 505 A.2d 262 (1986). Where the court failed to inform the defendant of his right to file a motion challenging the propriety of a mandatory sentence of life imprisonment without parole, the issue of the constitutionality of a life sentence has not been waived because it is essentially an attack on the legality of the sentence. *Commonwealth v. Middleton*, 320 Pa.Super. 533,

543 n. 5; 467 A.2d 841 (1993); Pennsylvania Rules of Criminal Procedure, Rule 1405(c)(2).

The Honorable Judge Savitt sentenced Defendant Pace to a term of life imprisonment for second degree murder without an established minimum sentence for parole elgibility. Assuming, for the sake of this argument only, that the court properly sentenced the Defendant to a life term, in failing to set a minimum sentence the court violated his statutory right to parole eligibility as established by 42 Pa.C.S., § 9756(c). That section provides:

> (c) Prohibition of Parole. – Except in the case of murder of the first degree, the court may impose a sentence to imprisonment without the right to parole only when:
>
> (1) a summary offense is charged;
>
> (2) sentence is imposed for nonpayment of fines or costs, or both, in which case the sentence shall specify the number of days to be served; and
>
> (3) the maximum term or terms of imprisonment imposed on one or more indictments to run consecutively or concurrently total less than 30 days.

Because Pace was not convicted of first degree murder, and none of the other exceptions within 9756(c) applies in his case, he was entitled under the plain statutory language to have the court set a minimum sentence which, under § 9756(c), could not exceed one-half the maximum, thus defining a parole eligibility date. 1 Pa.C.S. §1924. ("Exceptions expressed in a statute shall be construed to exclude all others.") As held in *Commonwealth v. Bell*, 512 Pa. 334, 516 A.2d 1172, 1175 (1986), applying 1 Pa.C.S. § 1921(b), when statutory language is clear, the

judiciary must read the provisions of a sentencing statute in accordance with plain meaning and usage.

Although § 9756(c) is free of ambiguity in and of itself, it must be read in connection with another statute which, on its face, prohibits the Pennsylvania Board of Probation and Parole from exercising its power to release on parole any person serving life imprisonment. That statute, 61 Pa.Stat. Section 331.21, provides that:

> The board is hereby authorized to release on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to said board, except convicts condemned to death or serving life imprisonment. . . .

Another statute, 61 Pa.Stat. §331.17, bestows on the parole board the "exclusive power to parole," and does not exclude cases in which the sentence imposed was life imprisonment.

Sections 9756(c) of Title 42 and 331.21 of Purdon's Title 61, although codified in different titles of the Pennsylvania penal law, are statutes "*in pari materia*" because they "relate to the same persons or things or to the same class of persons or things." 1 Pa.C.S. § 1932(a). Such statutes "shall be construed together, if possible, under one statute." *Id.* at (b). Indeed, under this definition all of the statutes within Pennsylvania's Crimes Code which pertain to sentences of life imprisonment are "*in pari materia*" with one another and with the relevant sections of Title 61, and should be read together, in a manner that, "if possible, [gives] effect to all [their] provisions." 1 Pa.C.S. §1921(a).

At first reading 42 Pa.C.S. §9756(c) and 61 Pa.Stat. 331.21 might appear to be in irreconcilable conflict. The former prohibits the court from sentencing a defendant convicted of a degree of murder other than first degree, some of whom, like the Defendant have been convicted of second degree murder and face life sentences, to a non parole eligible sentence; the latter prohibits the parole board from releasing prisoners serving life terms. Yet read and applied in relation to the pertinent portions of the Crimes Code and according to the Commonwealth's codified principles of statutory construction, the two statutes are, in fact, reconcilable.

There are two methods of reconciling the statutes to give both of them effect. The first is to recognize that in 1941, when the Title 61 provisions were enacted, Act of August 6, 1941, P.L. 861, the offense of murder of the first degree was the only offense for which a term of life imprisonment was provided. Section 9756(c) was not enacted until 1974. Act of Dec. 30, P.L. 1052, No. 345, transferred to Title 42 and recodified by Act of Oct. 5, 1980, P.L. 693, No. 142, § 401(a). Giving effect to the language of § 9756(c), it becomes clear the General Assembly did not intend to extend the reach of §331.21 to cover life sentences imposed in other than first degree murder cases. Thus, the enactment of what is now §9756(c) as part of the same 1974 criminal code reform that separated felony murder from willful and premeditated-murder establishes parole eligibility in those cases.

The other method of reconciling Sections 9756(c) and 331.21 involves a careful examination of the life terms provided in the Crimes Code. The legislature has specified that the terms of life imprisonment provided for certain aggravated types of murder shall be without parole. For

example, 18 Pa.C.S. §3301(b) provides that "[a] person convicted of violating the provisions of subsection (a)(2) [first degree murder by person committing arson] shall be sentenced to death or life imprisonment *without right to parole*"; the same is provided for arson-related murder in the second degree. In contrast, in Section 9715, under which Pace was sentenced, no such prohibition appears, nor does it in 18 Pa.C.S. § 1102(a) or (b), which provides terms of life imprisonment for murder in the first and second degree. This demonstrates that the legislature was explicit about prohibiting parole where it intended to do so. *Cf.* 1 Pa.C.S. Section 1924 ("Exceptions expressed in a statute shall be construed to exclude all others.") It did not intend to bar for life terms imposed, *inter alia*, under Section 9715.

When this statutory scheme is construed with Sections 9756(c) and 331.21, it becomes clear that where the latter section provides parole release for "convicts . . . serving life imprisonment," it must be read as referring to those offenses for which the legislature has specified terms of life imprisonment without right to parole. This reading that "[w]henever a general provision in a statute [the provision in Section 331.21] shall be in conflict with a special provision in . . . another statute [the opposite prohibition in Section 9756(c)], the two shall be construed, if possible, so that effect may be given to both." 1 Pa.C.S. Section 1933.

Alternatively, Sections 9756(c) and 331.21 may be seen as irreconcilable. The principle of statutory construction that statute "*in pari materia*" should be construed together is not absolute; the statute says this shall be done "if possible." 1 Pa.C.S. Section 1932(b). If it is not possible to give effect to both of these statutes, then Section 331.21,

as it pertains to persons serving life sentences for all offenses except first degree murder, must be seen as implicitly repealed, in pertinent part, by the later-enacted Section 9756(c). Under 1 Pa.C.S. Section 1936, "[w]henver the provisions of two or more statutes enacted finally by different General Assemblies are irreconcilable, the statute latest in date of final enactment shall prevail." See also 1 Pa.C.S. Section 1971 ("a later statute shall not be construed to supply or repeal an earlier statute unless the two statutes are irreconcilable." Section 9756(c) of Title 42 was enacted after Section 331.21 of Title 61, as discussed above. See also 1 Pa.C.S. Section 1928(b)(1) (penal provisions shall be strictly construed); *Commonwealth v. Darush*, 256 Pa.Super. 344, 389 A.2d 1165, 1158 (1978) (strict construction is in favor of defendant); *Commonwealth v. Cluck*, 252 Pa.Super. 228, 381 A.2d 472, 477 (1977) (any ambiguity in penal statutes must be resolved in favor of life and liberty).

In *Castle v. Pennsylvania Board of Probation and Parole,* 123 Pa.Comw. 570, 554 A.2d 625 (1989), *all app. denied*, 567 A.2d 653 (1989), an action by a prisoner to compel the scheduling of a parole hearing, the other intermediate appellate court rejected the argument that Section 9756(c) gave the defendant, there serving a life sentence for second-degree murder, a right to parole consideration and thereby impliedly repealed the contrary provisions in 61 Pa.Stat. Section 331.21. *Id.* at 628-29. The basis of its decision was the asserted lack of a stated purpose of Section 9756 to create parole eligibility, and the fact that the section only governs action by the trial court and not the parole board, whereas Section 331.21 prohibits the board from paroling prisoners serving life terms. *Id.*

For these reasons, the court did not find the two statutes "clearly irreconcilable," a prerequisite for finding repeal by implication. *Id.* at 629.

This court should decline to follow *Castle* here for two reasons. First, the *Castle* court was incorrect in stating that Section 9756 did not have as its purpose the creation of parole eligibility. Subsection (c) of that section is entitled "Prohibition of Parole," and expressly concerns parole eligibility. It lists specific instances in which the court may sentence without the right to parole, stating that these are the "only" such instances. In light of the codified principle of statutory construction that exceptions expressed in a statute exclude all others, 1 Pa.C.S Section 1924, it is clear that this subsection had as its purpose to and did create parole eligibility for all offenses not specified.

Second, because the General Assembly did intend Section 9756(c) to create parole eligibility, the *Castle* court was wrong in deciding that it was not irreconcilable with Section 331.21. Thus, we are left with the anomaly of one statute providing a right to parole, and another prohibiting the only body empowered to release on parole from doing so. It is presumed that "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S. Section 1922(1). The result of *Castle* is all three of these. In any event, this appeal *does* concern action of the sentencing court, which *is* expressly bound by Section 9756(b) and (c). Thus, at the least, this case may be readily distinguished on that basis.

All sentences imposed in Pennsylvania are for the maximum sentence. Maximum sentences are the "legal and valid" sentences imposed. *Commonwealth v. Daniels*, 430 Pa. 442, 243 A.2d 400 (1968). "The word 'sentence'

when unmodified by the words 'maximum' or 'minimum' necessarily refers only to the maximum sentence for that is the legal sentence." *Commonwealth v. Glover,* 397 Pa. 543, 546-47, 156 A.2d 114 (1959). "The legislature has the right to fix the maximum penalty and likewise can, if it sees fit, name the minimum." *Id.* at 5454. "When the legislature has desired to provide for a mandatory minimum in the past it has done so in unequivocal language." *Id.* at 547. The General Assembly has confirmed the *Glover* Court's analysis by subsequently adopting the Mandatory Minimum Sentencing Act, 42 Pa.C.S.A. Sections 9712, 9713, 9714, in which specific sentences are deemed to be mandatory minimum sentences, none of which include sentences of life imprisonment. If minimum sentences "are not implicated much less mandated by the sentencing statute, then the discretion of the trial court is necessarily the controlling factor." *Commonwealth v. Button*, 332 Pa.Super. 239, 244; 481 A.2d 342 (1984).

The legislature clearly intended to distinguish punishment for first-degree murder and second-degree felony murder from other criminal offenses, a goal accomplished by mandating the harshest *maximum penalty* of total confinement available. Inasmuch as the Statutory Construction Act, 46 P.S. Section 558, requires that all "penal provisions" be strictly construed in such a way that " . . . when a criminal statute calls for construction it is not the construction that is supported by the greater reason that is to prevail, but that one which, if reasonable, operates in favor of life and liberty . . . " *Commonwealth v. Glover*, supra; *Commonwealth v. Pristas*, 222 Pa.Super. 254, 260-61; 295 A.2d 114 (1972). 18 P.S. Section 4701, 18 Pa.C.S.A. Sections 1102 and 2502, and 42 Pa.C.S.A. Section 9711, must be deemed to mandate only maximum sentences of

life imprisonment, not minimum sentences as construed by courts and administrative agencies. It is apparent that the Superior Court views life sentences in Pennsylvania to be parole eligible inasmuch as the seven states cited by that Court as rationale for the constitutionality of consecutive sentences *all* provide for life sentences with specific minimum sentences, four which have no provision for "life without parole." *Commonwealth v. Button,* supra, at 245, n. 1.

This construction of the above cited statutes is a reasonable one that "operates in favor of life and liberty." First, imposition of a sentence without a stated minimum results in a "flat" sentence with an implied minimum of one day prior to June 27, 1978. *Commonwealth v. Ulbrick*, 462 Pa. 257, 258; 341 A.2d 68 (1978); *Commonwealth v. Butler*, 458 Pa. 289, 294; 328 A.2d 851 (1974); *Commonwealth v. Auschbacher*, 276 Pa.Super. 554, 556; 419 A.2d 596 (1980). Second, life-sentenced prisoners are not precluded from the benefit of 19 Pa.C.S. Section 1957 and 19 P.S. Section 1057:

> Whenever any person, convicted in any court of this Commonwealth of any crime punishable by imprisonment in a state penitentiary . . . the court . . . shall pronounce upon such convict a sentence of imprisonment for an indefinite term stating in such sentence the minimum and maximum limits thereof . . . "

Commonwealth v. Butler, supra., at 291. The only parameters placed upon the minimum sentence to be imposed by the court is that "the minimum shall never exceed one-half of the maximum sentence." 19 P.S. Section 1057; 42 Pa.C.S.A. Section 9756(b). This implies that the only minimum sentence precluded by these statutes when the

maximum sentence is life imprisonment is "life" itself, the very sentence presumed by the judiciary and administrative agencies.

Certainly a sentencing court may not sentence one convicted of second-degree felony murder to a lesser *maximum* sentence than life imprisonment. The *Castle* court erred by assuming that sentences of life imprisonment are other than simply maximum sentences. Given that two purposes of the Crimes Code, 18 Pa.C.S.A. Section 104(3)(5), effective June 6, 1973, are to "safeguard offenders against excessive, disproportionate, or arbitrary punishment" and "to differentiate among offenders with a view to just individualization in their treatment," and that components of the Crimes Code are to be construed in terms of these purposes, it is necessary to reconcile 18 P.S. Section 4701, 19 P.S. Section 1057, 19 Pa.C.S. Section 1957, 18 Pa.C.S.A. 1102, 1321(e) and 2502, and 42 Pa.C.S.A. Sections 9711 and 9756, inasmuch as none preclude another. "While [parole] is an amelioration of punishment, *it is in legal effect imprisonment. Commonwealth ex rel. Banks v. Cain*, 345 Pa. 581, 589; 28 A.2d 897 (1942); *Anderson v. Corall*, 26 U.S. 193, 196; 44 S.Ct. 43 (1923). If, under Pennsylvania law, a sentence to a five to ten year term of imprisonment is considered a ten-year sentence, (*United States ex rel. McNeils v. Pa. Board of Parole*, 141 F.Supp. 23 (1956), a sentence of one day to life imprisonment must be considered a sentence of life imprisonment and, therefore, in compliance with the foregoing statutes.

An overview of the foregoing statutes, either individually or *in pari materia*, raises reasonable constructions that favor life and liberty much more than past and current interpretations. First, the Parole Act, adopted

August 6, 1941, and amended to create the Pennsylvania Board of Probation and Parole December 27, 1965, has been explicitly repealed insofar as it is inconsistent with subsequent legislation, that is, with the phrase "or serving life imprisonment,' as found at 61 P.S. Section 331.21. The most noteworthy statutory refinement regarding parole eligibility for sentences of life imprisonment is found in the clear and concise language of 42 Pa.C.S.A. Section 9756, effective March 30, 1975. In Section 9756(c), the General Assembly very succinctly defined these offenders to whom parole elgibility *must* be afforded and those to whom the right to parole *may* be provided. Even the most cursory perusal of Section 9756(c) dictates the conclusion that, except for four (4) specific categories of offenses, the court may impose a sentence with parole eligibility.. Conspicuously absent from that group of four offenses are second-degree felony murder [18 Pa.C.S.A. Section 2704], and a subsequent conviction for an unrelated homicide [42 Pa. C.S.A. Section 9715], all of which mandate a sentence of life imprisonment. "A change of language in subsequent statutes on the same matter indicates a change of legislative intent." *Haughey v. Dillon*, 379 Pa. 1, 6; 108 A.2d 69 (1954); *Commonwealth v. Garcia*, 474 Pa. 449, 477; 378 A.2d 1199 (1977). Therefore, if the court properly sentenced Defendant Pace to a life term, it violated 42 Pa.C.S. Section 9755(b) and (c) by failing to set a minimum sentence, at the completion of which Defendant would be eligible for parole.

II. GUILTY PLEA COLLOQUY THAT FAILED TO ENSURE PETITIONER UNDERSTOOD CONSEQUENCES OF PLEA COMPELS WITHDRAWAL OF PLEA.

If the conclusion of the *Castle* Court that terms of life imprisonment imposed are mandatory minimum sentences, then this Honorable Court erred by accepting Defendant's guilty plea without informing him or insuring that he understood that a consequence of his plea would be a term of life imprisonment without parole. Defendant did not know that a consequence of his plea would be to spend the remainder of his life behind bars without becoming eligible for parole. Had he known, he would not have pleaded guilty. Such a defective colloquy violated the requirements of Pa.R.Crim.P. 319 and the due process provisions of the Constitutions of the United States and Pennsylvania.

The United States Supreme Court has consistently applied stringent standards for testing the validity of a guilty plea; that is, that it was made voluntarily after proper advice and with full understanding of the consequences of the plea. *McCarthy v. United States,* 394 U.S. 459, 89 S.Ct. 1166 (1969).

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable of canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences.

Boykin v. Alabama, 385 U.S. 238, 244; 89 S.Ct. 1709, 1712 (1969).

Pa.R.Crim.P. 319, the goal of which is "assurance that a defendant's guilty plea is tendered knowingly, intelligently, voluntarily and understandingly," [*Commonwealth v. Persinger*, 532 Pa. 317, 322, 615 A.2d 1305 (1992)], is but a restatement of this constitutional principle as well as existing law and practice. As the Third Circuit has said:

> We therefore reach the same conclusion as did the Ninth Circuit in Munich v. United States, 337 F.2d 356 (1964): "[O]ne who, at the time of entering a plea of guilty, is not aware of the fact that he would not be eligible for probation or parole, does not plead with understanding of the consequences of such a plea."

Berry v. United States, 412 F.2d 189, 193 (3rd Cir. 1969). Thus, failure to advise Defendant of the consequences of his plea – ineligibility for parole – is equal to a denial of due process. "[P]rejudice inheres when an accused pleads guilty, thus convicting himself of a criminal offense, without understanding the significance or consequences of his action." *Id.* at 191.

The mandate of Pa.R.Crim.P. 319, as well as its federal counterpart, Fed.R.Crim.P.11, is designed to ensure that the pleader is apprised, at the very least, of the period of *required* incarceration. Loss of parole eligibility is "an inseparable ingredient of the punishment imposed." *Id.* at 192; *In re Grand Jury Investigation,* 542 F.2d 166, 173 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1047 (1977). Failure to impart information regarding "'the worst to expect,'" in terms of imprisonment is a failure to explain the consequences of a plea. *Roberts v. United States,* 491 F.2d 1236, 1238 (3rd Cir. 1974). The worst conceivable term of imprisonment is life imprisonment without parole.

Ordinarily, it would not be necessary for a trial court to include an explanation of probation or parole in its inquiry into a defendant's understanding of his plea. However, circumstances surrounding a plea that mandates a sentence of life imprisonment without the possibilty of parole is not ordinary. The particular status of such defendants brings into mechanical operation a legislative directive severely restricting the freedom of action of the sentencing judge as well as the parole authority. "Under such circumstances, the knowledge of ineligibility for parole is as necessary to an understanding of the plea as is the knowledge of the maximum sentence possible." *Berry v. United States,* 412 F.2d 189, 192-193 (3rd Cir. 1969).

This constitutional principle was applied to Pennsylvania law by the Third Circuit Court of Appeals in *United States ex rel. Crosby v. Brierley,* 404 F.2d 790 (3rd Cir. 1968), *overruled by United States ex rel. Grays v. Rundle,* 428 F.2d 1401 (3rd Cir. 1970). The *Crosby* Court stated that Pa.R.Crim.P. 319 anticipates:

> . . . an inquiry of the defendant to form the factual basis that the plea is "competently and intelligently made" . . . . Trial courts have a duty . . . to insure that the defendant understands the consequences of his plea. This is not so much the result of promulgations of federal and state rules of criminal procedure as it is a part of the basic concepts of proper judicial admininistration in Pennsylvania. . . .

Id. at 794. The rationale of *Berry,* that failure to advise a defendant, prior to acceptance of guilty plea, of ineligibility for parole denies due process, was adopted by the Pennsylvania Supreme Court in *Commonwealth v. Zuber*, 466 Pa. 453, 461; 353 A.2d 441, 445 (1976).

The mandatory nature of Rule 319 was clearly established in *Commonwealth v. Ingram*, 455 Pa. 198, 316 A.2d 77 (1974). Other cases indicate that six specific areas of inquiry must be explored, the most relevant being whether the defendant is aware of the permissible range of sentences for the offenses charged. *Commonwealth v. Willis,* 417 Pa. 50, 52, 369 A.2d 1189 (19977); *Commonwealth v. Fay,* 294 Pa.Super. 332, 337, 439 A.2d 1227 (1982). Lack of such inquiry or notice deprives the defendant of "the right to weigh the alternatives of going to trial versus entering a guilty plea . . . because of the real possibility . . . that he was misled or acted pursuant to inaccurate or incorrect information" [*Commonwealth v. Leonhart,* 358 Pa.Super. 494, 501, 517 A.2d 1342 (1986)] and requires that the defendant be allowed to withdraw his guilty plea. *Commonwealth v. Kulp,* 476 Pa. 358, 382 A.2d 1209 (1978). Before accepting a plea of guilty, the court must insure that the defendant understands the meaning of words like "consecutive". *Commonwealth v. Guyton,* 331 Pa.Super. 231, 480 A.2d 330 (1984). No less important are words and phrases like *life imprisonment* and *mandatory minimum sentences.* "[N]o plea can be viewed as voluntary that is the product of ignorance." *Commonwealth ex rel. West v. Myers,* 423 Pa. 1, 5-6, 222 A.2d 918 (1966).

The explicit purpose of the Crimes Code, "to give fair warning . . . of the sentences that may be imposed on conviction of an offense," is relevant.18 Pa.C.S. §104(4). Significantly, the ABA Standards For Criminal Justice, Second Edition at 14-1.4, provides the following:

> (a) The Court should not accept a plea of guilty . . . from a defendant without first addressing the defendant personally in open court and determining that the defendant understands:

> . . . . (ii) the maximum possible sentence on the charge, including that possible from consecutive sentences, and the *mandatory minimum sentence*, if any, on the charge, or any special circumstances affecting probation or release from incarceration. (emphasis added)

Commonwealth v. Persinger, 532 Pa at 323-24, held that the reasoning behind the above Standard is sound because it insures that the defendant appreciates the significance and consequences of his plea. See also *Commonwealth v. Fay*, 294 Pa.Super. at 237. The *Persinger* Court went on to hold that failure of the trial court to abide by this Standard results in the defendant suffering *manifest injustice*. Defendant contends that such miscarriage of justice mandates that neither "delay" nor "multiple petitions" bar PCRA or federal habeas corpus challenges to this denial of due process.

Analogous to 42 Pa.C.S. §9718, Sections 4701, 1102, 2704, and 9715 contain no notice requirement prior to imposition of a mandatory minimum term of life imprisonment. However, "there can be no mistake that notice of intention to pursue a mandatory minimum sentence under §9718 is necessary . . . before acceptance of guilty plea. Moreover, it is clear that such a requirement is born not of legislative enactment, but rather from judicial interpretation of due process guarantees whose purposes are to inform defendant of *all* of the consequences of entering a guilty plea before the act has become *fait accompli* . . . What is important is that Appellant was made aware of the consequences of his action *prior* to the acceptance of his plea." *Commonwealth v. Boyles*, 414 Pa.Super. 282, 293, 606 A.2d 1201.

A guilty plea may be attacked after sentencing on three grounds: legality of sentence, jurisdiction of the court, and the voluntary, knowing, and intelligent nature of the guilty plea itself. *Commonwealth v. Alston*, 387 Pa.Super. 393, 564 A.2d 235 (1989). In determining whether a guilty plea is voluntarily and understandingly entered, it is mandatory that the court ask questions to ascertain the defendant's awareness of the permissible range of sentences. *Commonwealth v. Persinger*, 532 Pa. at 321. The absence of this inquiry from the transcripts renders the colloquy defective which, in turn, provides adequate grounds for withdrawal of the plea. Counsel's failure to seek withdrawal of Defendant's plea was, therefore, prejudicial to Defendant. *Id.* at 234.

In the instant case, this Honorable Court failed to advise Defendant that a consequence of his plea would be a mandatory minimum term of life imprisonment. The Court only made reference to the maximum penalty:

> Q [THE COURT]; If I find you guilty or if I accept the plea to second degree murder, you must know that the sentence is life imprisonment. Do you understand that?
>
> A Yes.

TT: 43. Defendant was unaware that the forfeiture of his right to a trial by jury would result in his removal from society, without eligibility for parole, for the remainder of his life.

That Defendant was misinformed about the consequences of his plea is also evident by the comments guilty plea Attorney Dunworth made to Defendant's PCRA/ Superior Court counsel, David S. Rudenstein:

> .... your prior counsel admitted to me on the telephone that she did not explain Life was Life without parole simply because she had a very difficult emotional time dealing with such a prospect for you and your family.

[Exhibit D in the instant PCRA Motion]. Attorney Dunworth's statement to Attorney Rudenstein makes it clear that she did not inform Defendant that he was pleading guilty to a life sentence without parole eligibility. Moreover, her statements to both the Defendant and his family [Exhibits A, B and C in the instant PCRA Motion] that he would be eligible for parole sometime after serving ten years was completely misleading and inaccurate to Defendant. In *Strader v. Garrison*, 611 F.2d 61, 65 (1979), the Forth Circuit held that, "[T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel;" see also *Sparks v. Sowders,* 852 F.2d 882, 885 (6th Cir. 1988).

Whether the Court was aware or unaware that Defendant Pace's understanding was factually and legally incorrect may be irrelevant. What is relevant is that the Court allowed Defendant to plead guilty believing he would be eligible for release after serving a certain amount of time. Had Defendant known of the true and correct nature of the penalty, he would not have pleaded guilty. The Court's acceptance of his guilty plea under these circumstances and others, then, was a complete miscarriage of justice warranting the withdrawal of the plea because before a guilty plea is accepted, a defendant must

be aware of the outer limits of the punishment and the full consequences of the plea.

III. INEFFECTIVE ASSISTANCE OF COUNSEL AT ALL LEVELS OF REPRESENTATION RESULTED IN DENIAL OF DUE PROCESS.

The threshold inquiry into claims of ineffective assistance of, counsel is: (1) does the underlying issue have merit, (2) was the course chosen by counsel designed to effect Defendant's interests, and (3) did counsel's omission prejudice Defendant. *Commonwealth v. Persinger*, 532 Pa. at 321.

In addition to the substantive defects in the plea colloquy set out previously, Defendant contends that trial counsel was ineffective for failing to correct these defects prior to the entry of his plea. This ineffective assistance of counsel caused defendant to enter his plea unknowingly, unintelligently, involuntarily, and without a full understanding of the consequences.

Trial counsel was ineffective for failing to insure that the Defendant understood the terms and consequences of the plea, explain or have the court explain that a life sentence was a mandatory minimum sentence without parole eligibility, challenge the legality of the life sentence without a stated minimum sentence for parole eligibility, and file an appeal. Additionally, counsel's misleading and inaccurate statements to the Defendant and his family that he would be eligible for parole after serving ten years violated Defendant's constitutional right to competent and effective counsel. As a result of this ineffectiveness, Defendant entered his plea without a full understanding of the consequences, in violation of his constitutional rights.

Trial counsel's derelictions were not reasonably designed to advance Defendant's interests. In fact, counsel's deficient performance caused Defendant to enter his plea unknowingly and involuntarily. See *Commonwealth v. Persinger*, 532 Pa. 317, 324, 615 A.2d 1305, 1308 n. 6 (1992). As the purpose of the plea colloquy is to insure that a defendant enters his plea knowingly, intelligently, and voluntarily, it cannot be said that trial counsel advanced Defendant's interests when her deficient performance prevented this from occurring. For similar reasons, Defendant was prejudiced by counsel's ineffective assistance, as counsel's deficient performance led him to enter the plea unknowingly and involuntarily, thereby depriving him of his constitutional right to a jury trial. Counsel's ineffectiveness further prejudiced Defendant in that he has spent the past 14 years in prison as a result of a conviction that resulted from a defective and unlawfully induced guilty plea that was negotiated by trial counsel.

Thereafter, trial counsel was ineffective for failing to file a motion to withdraw the guilty plea when she knew or should have known that there was a factual and/or legal basis for the withdrawal of the plea. Defendant did not seek to withdraw his guilty plea based on the issues raised herein until now because trial counsel led him to believe that there was no basis for such action and because previous appellate counsel were ineffective. Furthermore,:

> [t]he Commonwealth's position is, in essence, that appellant should have recognized, without assistance of counsel, the defect in the guilty plea colloquy and his counsel's ineffectiveness. The law does not expect so much of appellant, a layman.

Commonwealth v. Allen, 278 Pa.Super. 501, 508, 420 A.2d 653, 656 (1980). In *Commonwealth v. Wilks*, 250 Pa.Super. 182, 191, 378 A.2d 887, 891 (1977), the Court held that "to require a criminal defendant to recognize the ineptitude of his lawyer would be unreasonable."

In *Persinger,* the Pennsylvania Supreme Court held that defense counsel was ineffective for failing to file a motion to withdraw pleas of guilty when the defendant was never advised of the possibility of consecutive sentences. In that case the Supreme Court reasoned that the defendant's claim was of arguable merit because the defect in the plea colloquy rendered the plea unknowing and involuntary, rising to the level of a manifest injustice for the reasons previously discussed. Therefore, a basis existed for the withdrawal of the plea. Having found that the defendant's claim was of arguable merit, the Supreme Court concluded that he was prejudiced by counsel's failure to file a motion to withdraw the plea. *Commonwealth v. Persinger*, 532 Pa. 317, 615 A.2d 1305 (1992). The Supreme Court then concluded, without the benefit of an evidentiary hearing, that there could have been no reasonable basis designed to advance the defendant's interests for counsel's failure to file a meritorious motion on the defendant's behalf. Similarly, in the instant case, the failure to file a motion to withdraw the plea was not designed to advance Defendant's interests and therefore prejudiced him.

In the instant case, neither counsel nor the trial court explained to Defendant, nor did either seek to ascertain if he understood, that a consequence of his guilty plea could or would be a *mandatory minimum* sentence of life imprisonment without the possibility of parole. Moreover, counsel failed to object to the court's defective colloquy which

denied Defendant due process of law. Furthermore, counsel failed to raise this meritorious issue on appeal.

There could be no reason for counsel's failure to inform Defendant that a special circumstance of his plea would preclude his release from incarceration for the remainder of his life. Moreover, guilty plea counsel's gross *misinformation* to Defendant and his family, that he would be eligible for parole sometime after serving ten years, deprived Defendant of his constitutional right to effective assistance of counsel.

Here, as in the *Persinger* case, failure of the court to abide by Standard 14-1.4, 2nd Edition, ABA Standards For Criminal Justice, resulted in Defendant "suffering manifest injustice." Because such manifest injustice provided "adequate grounds for withdrawal of [Petitioner's] plea, counsel's failure to seek withdrawal of [such] plea was prejudicial to [Petitioner] . . . There was no reasonable basis for counsel's failure to explain the consequences of the plea and, therefore, counsel was ineffective." *Commonwealth v. Persinger*, 532 Pa. at 323-24.

As set out previously, a PCHA petition and subsequent appeal to the Superior court were filed by Attorney Rudenstein. In that appeal, counsel challenged only the defects in the colloquy pertaining to Defendant's lack of understanding of the consequences of the plea. Even with that counsel was ineffective for this reason: Defendant asked Attorney Rudenstein, prior to the conclusion of the PCHA evidentiary hearing, to call trial counsel Dunworth to the stand and ask her why she misinformed Defendant and his family that he would be eligible for parole sometime after serving ten years and why she failed to tell him that he would never be eligible for parole, but counsel

failed to call her and establish for the record her ineffectiveness. As a result, the issues raised in the instant appeal were never presented to the court for review. Pace himself did not knowingly and intelligently fail to raise these issues in any prior proceedings. Moreover, he has demonstrated the existence of extraordinary circumstances to justify his failure to raise these issues before now. Defendant Pace never gave Attorney Rudenstein permission to waive these issues, nor did Attorney Rudenstein inform him that if this and other issues were not raised in that PCHA petition, these issues would be waived. Because the issues raised in this motion have merit, Attorney Rudenstein was constitutionally ineffective for failing to pursue these issues on appeal and for failing to raise Attorney Dunworth's ineffectiveness for failing to raise these issues.

In conclusion, Attorney Rudenstein was constitutionally ineffective for failing to raise prior counsel's ineffectiveness for failing to raise the issues herein, and for failing himself to raise the issues raised herein.

IV. THE ISSUES RAISED HEREIN WOULD ENTITLE PACE TO FEDERAL HABEAS CORPUS RELIEF.

If this Court should find that the issues raised herein do not implicate the truth determining process, Defendant would still be entitled to post conviction collateral relief under 42 Pa.C.S.A. Section 9543(a)(2)(v). This section provides for PCRA relief when a conviction has resulted from "[a] violation of the provisions of the Constitution, law or treaties of the United States which would require the granting of Federal habeas corpus relief to a state prisoner."

In the present case, Defendant was deprived of his right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when he entered his guilty plea unknowingly, unintelligently, and involuntarily because of the defects in the colloquy, because of the illegal sentence of life imprisonment without a stated minimum sentence for parole eligibility, and because of the deficient performance of his trial and appellant counsel. Because this claim implicates Pace's rights secured by the United States Constitution, he would be entitled to federal habeas corpus relief if there is no state procedural bar to such relief.

As discussed previously, there is a potential waiver of the issues raised herein because they were not raised previously by trial or appellant counsel. However, the federal courts will excuse a state procedural default based upon a showing of cause and prejudice. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977). Here the ineffective assistance of Defendant's prior attorneys constitutes cause to excuse the procedural default because Defendant had a constitutional right to counsel at the stages in the proceeding where counsel's ineffectiveness resulted in alleged waiver. *Commonwealth v. Eaddy*, 419 Pa. Super. 48, 56; 614 A.2d at 1203. Defendant was prejudiced by this ineffective assistance for the reasons previously discussed. A convicted person has a right to an appeal and has the right to effective representation of counsel for purposes of the appeal. There is no effective representation when counsel through inadvertence or otherwise fails to raise an arguably meritorious issue on appeal. *Commonwealth v. Pfaff*, 477 Pa. 461, 384 A.2d 1179 (1978).

> This crucial right to direct review of all criminal convictions, guaranteed under the Pennsylvania constitution, should not be lost due to the incompetent advice of prior counsel that no meritorious issues exist.

Eaddy, supra, 614 A.2d 1208.

When the failure to preserve an issue on direct appeal is the product of ineffective assistance of counsel, such failure does not result in a waiver of the issue for the purposes of post conviction collateral relief. *Commonwealth v. McNeil*, 497 Pa. 187, 439 A.2d 664 (1982); *Commonwealth v. Felder*, 246 Pa.Super. 324, 370 A.2d 1214 (1976). In *Commonwealth v. Bable*, 248 Pa.Super. 496, 375 A.2d 350 (1977), the Superior Court concluded that counsel's ineffective assistance in failing to challenge the validity of a plea on direct appeal, when there was a legal basis for such a challenge, constituted an extraordinary circumstance entitling the defendant to withdraw his plea pursuant to the PCHA proceeding. Moreover, when each of a PCRA petitioner's previous attorney is alleged to have rendered ineffective assistance of counsel, which if alleged would have preserved the issue for review, the issue of ineffective assistance of counsel is itself properly preserved for review. *Commonwealth v Bradley*, 332 Pa. Super 99, 480 A.2d 1205 (1984); *Commonwealth v. Nelson*, 393 Pa. Super. 611, 574 A.2d 1107, 1109 (1990); *Commonwealth v. Perlman*, 392 Pa.Super. 1, 572 A.2d 2 (1990).

Defendant's claims, then, are cognizable under the PCRA even if they do not implicate the truth determining process. *Id.*, 614 A.2d at 1208.

V. CONCLUSION

On the basis of the record, motion, and exhibits, Defendant respectfully prays that this Court order a withdrawal of his guilty plea and a new trial.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I personally caused to be served upon the following a true and correct copy of the foregoing Memorandum of Law in Support of Defendant's Motion under Post Conviction Relief Act by First Class Mail, postage prepaid on November 24, 1996:

Lynne Abraham, Esquire
District Attorney of Philadelphia
Appeal Unit 1421
1421 Arch Street
Philadelphia, PA 19102

ATTENTION: DEPUTY CHIEF

/s/ John A. Pace
John Allen Pace, Pro se
1100 Pike Street, AY6445
Huntingdon, PA 16654-1112

COURT OF COMMON PLEAS
JUDGE'S CHAMBERS

JOSEPH I. PAPALINI
JUDGE

RM. 206, C.J.C.
PHILADELPHIA, PA. 1910
DATE 01/17/97

TO- MR. ALFRED R. CARLONE
CRIMINAL LISTINGS
ROOM 206, C.J.C.

RE-COMMONWEALTH VS. JOHN A PACE — CP 8510-1272 1/1

AFTER REVIEWING THE RECORD IN THE ABOVE CAPTIONED MATTER, I AM DIRECTING THAT YOU APPOINT COUNSEL TO REPRESENT THIS PETITIONER IN HIS PCRA PETITION NOW BEFORE THIS COURT.

PLEASE NOTIFY COUNSEL THAT A CONFERENCE DATE HAS BEEN SET FOR 2/19/97, IN ROOM 206, C.J.C.

VERY TRULY YOURS,

DAVID N SAVITT
JUDGE

2/ QUARTER SESSIONS-FILE COPY

DAVID BELMONT
ATTORNEY-AT-LAW
1700 WALNUT STREET, SUITE 310
PHILADELPHIA, PA 19103

[LOGO]

(215) 545-3967

JUNE 13, 1997

Honorable David N. Savitt
Suite 1417
Criminal Justice Center
1301 Filbert Street
Philadelphia, PA 10107

RE: COMMONWEALTH V. JOHN PACE
C.P. #8510-1272-1/1
FINLEY LETTER

Dear Judge Savitt:

I was appointed to represent John Pace on February 21, 1997. This letter is written after having reviewed the Quarter Sessions file, read the Notes of Testimony of the hearing, Common Pleas Court Opinion, the First P.C.R.A. Petition, P.C.R.A. correspondence from Petitioner, and Researched the Law on all issues raised by the defendant, Including but not limited to the following assertions by the Petitioner for P.C.R.A. relief:

1. Whether petitioner was misled into entering his guilty plea.

2. Whether trial counsel was ineffective for failing to properly advise him of the consequences of his guilty plea. Whether PCRA counsel (David Rubinstein) was ineffective in failing to subpoena trial counsel to testify at the evidentiary hearing.

My exhaustive review of the case has lead me to the conclusion that there are no issues of arguable merit and that there is not basis upon which relief can be granted under the Post Conviction Relief Act, 42 P.S. Section 9541, et. seq. I write now, in keeping with the holding of *Common v. Turner*, Pa. 544 A. 2d 927 (1988); *Commonwealth v. McClendon*, 495 Pa. 467, 434 A. 2d 1185 (1981); *Pennsylvania v. Finley*, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987) and, *Commonwealth v. Finley*, 330 Pa. 313 479 A. 2d 568 (1984), to set forth the possible issues to be raised in a PCHA proceeding and the reasons where there are no issues of arguable merit.

On September 18, 1985 the petitioner was arrested for the beating of Randolph Baldwin. Mr. Randolph Baldwin died on September 28, 1985 and the petitioner was charged with murder and possession instrument of crime.

A lengthy colloquy of the defendant was conducted by the trial court (N.T. 2/13/86, pgs. 27-46). On December 13, 1986, the defendant was sentenced to the State Correctional Institution for a period of life imprisonment on the second degree murder charge (1275), also no more than one year nor more than two years to run concurrent on the possession instruments of crime (1272). No motion to reconsider the guilty plea was filed and petitioner did not take a direct appeal. Six months after his guilty plea and sentencing, petitioner filed a *pro se* petition for relief under the P.C.H.A. on August 21, 1986.

Petitioner filed a pro se Motion for Leave of Court to have defense counsel replaced by new counsel on February 23, 1987.

New counsel Franklin Green was appointed and he filed an Amended Petition on March 31, 1987. Commonwealth filed a Motion to Dismiss on June 3, 1987. Franklin Green filed an Answer to Commonwealth's Motion to Dismiss. On July 25, 1988 by Order of the Court, Commonwealth's Motion to Dismiss the Defendant's P.C.R.A. was denied and an evidentiary hearing was conducted on November 15, 1988.

Franklin Green, Esquire was permitted to withdraw as counsel on June 16, 1989. David Rubinstein, Esquire was appointed on July 28, 1989, to represent the petitioner on his second Post Conviction Relief Act Petition. David Rubinstein, Esquire filed an Amended Petition on October 27, 1989. On March 29, 1990, Commonwealth filed a Motion to Dismiss the defendant's P.C.R.A. Petition.

An evidentiary hearing was held on March 26, 1991, at which petitioner testified. On July 23, 1991, the lower court granted the Commonwealth's Motion to Dismiss.

On November 25, 1991, David Rubinstein filed a brief with the Superior Court of Pennsylvania. On March 30, 1992 the Superior Court of Pennsylvania affirmed the judgment of the lower court.

On July 2, 1992 petitioner filed a Petition for Allowance of Appeal Nunc Pro Tunc. On September 2, 1992 the Petition was denied by the Supreme Court of Pennsylvania.

On March 24, 1997, David Belmont, Esquire was appointed to represent the petitioner on another Post Conviction Relief Act Petition. This PCRA petition raises almost identical issues that was raised in the two prior PCRA petitions. The petitioner informs me that Mr.

Rubinstein was also ineffective for failing to subpoena trial counsel to testify at the evidentiary hearing.

I. Whether petitioner was misled into entering his guilty plea.

The record fails to support the allegations that petitioner did not knowingly and intelligently enter the guilty plea or that in some manner petitioner believes the court knew he didn't have the guilty interest to have been able to commit the crime of murder.

At the outset counsel for petitioner must point out that prior to the entry of all guilty pleas, the defendant must be advised of the nature and consequences of a guilty plea. Here, petitioner responded to each of the questions posed by the Court and he appeared to understand everything which was being explained to him. There is no allegation that the colloquy conducted was not in conformity with the mandate set forth by the Pennsylvania Supreme Court in the case of *Commonwealth vs. Ingram*, 455 Pa. 198 (1974). See also, *Commonwealth vs. Campbell*, 451 Pa. 465, 304 A.2d 121 (1973); *Commonwealth vs. Jackson*, 450 Pa. 417, 299 A.2d 209 (1973); *Pa. Rules of Criminal Procedure 319.*

In the case of *Commonwealth vs. Brown*, 363 A.2d 1249, 1253 (1976), the Pennsylvania Supreme Court stated:

> "A criminal defendant who elects to plead guilty has a duty to answer questions truthfully. We can not permit a defendant to postpone the final disposition of his case by lying to the Court and later alleging that his lies were induced by the prompting of counsel."

See also *Commonwealth vs. Cappelli*, 489 A.2d 813 (1985). In this case the petitioner/defendant entered his guilty plea knowingly and voluntarily. Nothing in his testimony shows that he was induced to enter his plea by promises made by counsel (N.T. 2/13/86, pgs. 27-46).

It is well settled that counsel can not be deemed ineffective if it was in the defendant's best interest to enter a guilty plea. *Commonwealth vs. Burno*, 456 A.2d 1080 (1983); *Commonwealth vs. Newell*, 406 A.2d 733 (1979).

There is presumption that counsel's representation was competent. *Commonwealth vs. Miller*, 431 A.2d 233 (1981). A defendant who asserts to the contrary in a Post Conviction Hearing Act proceeding has the burden of proving such an assertion. *Commonwealth vs. Dunbar*, 470 A.2d 74 (1983).

II. Whether trial counsel was ineffective for failing to properly advise petitioner of the consequences of his guilty plea. Whether PCRA counsel (David Rubinstein) was ineffective in failing to subpoena trial counsel to testify at the evidentiary hearing.

The test to determine whether counsel was effective is set out in *Commonwealth ex rel Washington vs. Marone*, 427 Pa. 604 (1967) at page 604:

> ". . . our inquiry ceases and counsel's assistance is deemed constitutionally effective once we are able to conclude that the particular course chosen by counsel had some reasonable basis designed to effectuate his client's interest."

In *Commonwealth vs. Pierce*, 527 A.2d 1973 (1987), the Supreme Court required to consider the standard for

analyzing ineffectiveness of counsel claims and to compare *Commonwealth ex rel Washington*, Supra with *Strickland vs. Washington*, 466 U.S. 688, 104 S.Ct. 2052 (1984). The court in its analysis in *Pierce*, Supra at p. 976:

> "In determining whether counsel performance had any reasonable basis, Appellant points to *Commonwealth vs. Badger*, 482 Pa. 240, 393, A.2d 642 (1978), where we cautioned a reviewing court that: in examining the alternatives a court may not realize a harmless error analysis, and the alternatives must be examined only as a means of determining whether the course chosen had some reasonable basis." id. at 233, 393 A.2d at 644.

There is nothing in the Pretrial record or guilty plea Transcripts to infer that counsel was ineffective. Conversely, counsel vehemently represented the petitioner but he claims counsel was ineffective.

There is likewise nothing in the PCRA record or in the action taken by Mr. Rubinstein in his appeal to the Superior Court of Pennsylvania to support petitioner's contention of ineffective assistance.

Petitioner's claim lacks arguable merit because I am unable to conclude any ineffective assistance of counsel, or am I able to find that petitioner didn't knowingly and intelligently enter a guilty plea.

It is clear that John Pace had a full and fair opportunity with legal counsel to argue, any legal issues which existed in his case. He arrives at the Post Conviction Relief Act stage of his legal journey having fully and completely had an opportunity to litigate all issues, real and imagined, in his case before the Pennsylvania Courts

(Common Pleas Court, Superior Court, and Petition to the Supreme Court).

In conclusion, no issues of arguable merit exist in this case. All the issues raised by John Pace either have been finally litigated or are patently frivolous. I therefore respectfully submit that John Pace's Post Conviction Relief Act Petition be dismissed. I also request that I be allowed to withdraw as counsel for petitioner.

Respectfully Submitted,

/s/ David Belmont
DAVID BELMONT, ESQUIRE
ATTORNEY FOR JOHN PACE

[LOGO]

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS
JUDICIAL CHAMBERS

DAVID N. SAVITT
JUDGE

1417 CRIMINAL
JUSTICE CENTER
1301 FILBERT STREET
PHILADELPHIA, PA 19107
(215) 683-7148/49

June 17, 1997

Mr. John Pace, #AY-6445
SCI at Huntingdon
Drawer R
Huntingdon, PA 16652

RE: COMMONWEALTH v. JOHN PACE – PCRA
CP8510-1272,1/1

Dear Mr. Pace:

The court, after review of the Finley letter filed by your lawyer and the trial record has determined that the issues raised in your *pro se* Post Conviction Relief Act Petition are without merit. Accordingly, your petition will be dismissed at the next listing on Wednesday, July 23, 1997.

You have ten (10) days to respond to this notice.

Yours truly,
/s/ Saundra L. Dillio
Saundra L. Dillio
Law Clerk to Judge Savitt

DNS:mmh

Enclosure:

cc: David Belmont, Esquire
Robin Godfrey, Esquire, ADA
Kathleen Teti, Supervisor, PCRA Unit

John A. Pace
1100 Pike Street, AY-6445
Huntingdon, PA 16654

June 23, 1997

Honorable David N. Savitt
Suite 1417
Criminal Justice Center
1301 Filbert Street
Philadelphia, PA 10107

RE: COMM.V. JOHN A. PACE C.P. #8510-1272-1275
Objections to Belmont's FINLEY LETTER

Dear Judge Savitt:

I object to the contentions that attorney David Belmont expressed in his letter that I received June 20, 1997 indicating that he have filed a *Finley Letter* with you to have my P.C.R.A. petition dismiss as frivolous, and to allow him to withdraw from my case.

I have not had the opportunity to have a meaningful discuss with Mr. Belmont about my case, because I was advised by him to communicate with him through correspondance because he's never in his office. I wrote Mr. Belmont twice indicating what issues I wanted him to raise, and that if he have any questions to please contact me. But I never received a response from him concerning the issues. Now subsequently, I receive a letter indicating that a *Finley Letter* has been filed, and I have 10 days to respond to this Honorable court.

I am no longer at SCI-Camphill prison, and have not been an over six years. I advised Mr. Belmont of this in one of my previous correspondence with him. The fact that he mailed this letter to Camphill prison and not to Huntingdon has caused me to receive his letter late. [See photo

copy of letter front.] Also, I don't know if it is appropriate for me to respond to Mr. Belmont's letter without notification from this court. So I am somewhat in limbo about my correct course of action, if any is needed.

However, if this court has takes an independent view of this matter, and than decided that I should response to the contents of Mr. Belmont's Finley Letter. I would kindly request this court to *grant me 30 days* before I have to response, because the delay in receiving his letter and getting access to the law library makes it almost impossible for me to immediately respond. Also, because the Department of Corrections is transferring inmates from this institution to reduce the population. I am expecting to be transferred soon. So *30 days* would suffice for me to properly respond if your honor informs me that there is a need to do so. I would be very grateful to you for your understanding and direction in this matter.

I thank you for your time . . . And hope to hear from you soon.

Respectfully yours,

John A. Pace, #AY-6445
1100 Pike Street (SCIH)
Huntingdon, PA 16654-1112

JP
xc: Kathleen Teti, PCRA Unit Office of the
District Attorney David Belmont File

DAVID BELMONT, ESQUIRE
1700 WALNUT STREET
SUITE 310
PHILADELPHIA, PA 19103

Fold at line over top of envelope to the right of the return address

CERTIFIED

P 326 488 223

MAIL

UNITED STATES POSTAL SERVICE

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U.S. POSTAGE
PAID
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19107
JUN 13, '97
AMOUNT

$3.00
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RETURN RECEIPT
REQUESTED

Mr. John Pace
AY-6445

FORWARD TO:
SCI, HUNTINGDON
PIKE STREET, DRAWER R
HUNTINGDON, PA 16652

248
Hunt

BEST AVAILABLE COPY

COMMONWEALTH VS.	SUPPLEMENT TO: INDICTMENT NO.
NAME, A/K/A, ADDRESS, ZIP CODE John Pace 648663	YEAR, TERM & NO. 8510-
STATUS OF DEFENDANT	THIS CASE INVOLVES NOS. 1272 TO 1275
PROCEEDING	

DATE	TYPE	COURTROOM
7-23-97	PCRA	607

COURT CLERK
[Illegible]

COURT STENO.
Jodi Pitta

ADA
Jan Folena

DEF. COUNSEL
David Belmont

DOCKET IN CHRONOLOGICAL ORDER
(List Charge No. and follow with sentence – signed & dated by Judge)

Hon. David N. Savitt 7-23-97 Rm 607
Defendants objections – Dismissed
PCRA Petition – Dismissed
By the Court Savitt J.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	NOVEMBER TERM, 1985
	:	NO. 1272, 1/1
v.	:	SUPERIOR COURT NO.
JOHN PACE	:	

OPINION

SAVITT, J. JULY 29, 1997

PROCEDURAL HISTORY

Petitioner John Pace pled guilty to second degree murder and possession of an instrument of a crime for the beating death and robbery of Randolph Baldwin on September 18, 1985. A thorough and complete guilty plea colloquy was conducted by this court on February 13, 1986. Neither a motion to withdraw the guilty plea nor a direct appeal was ever filed.

On August 21, 1986 petitioner filed a *pro se* PCRA petition, counsel was appointed and filed an amended petition on March 31, 1987. On July 25, 1988 the Commonwealth's Motion to Dismiss, which had been filed on June 3, 1987, was denied and a evidentiary hearing was held on November 15, 1988. On June 16, 1989 counsel was permitted to withdraw and new counsel was appointed and filed a supplemental amended petition. Another evidentiary hearing was held on March 26, 1991 and on July 23,1991 the court granted the Commonwealth's second motion to dismiss, which had been filed on March 29, 1990. On March 30,1992 Superior Court affirmed the

lower court and petitioner filed a petition for allowance of appeal which was denied by the Pennsylvania Supreme Court on September 2,1992.

The second and instant petition was filed on March 24,1997, counsel was appointed and filed a Finley letter on June 17, 1997. Petitioner was timely notified and, on July 23,1997, the petition was dismissed. This appeal followed. The sole issue raised by petitioner here, that his guilty plea was not knowing and voluntary, was raised in petitioner's first PCRA petition. A petitioner is not entitled to PCRA review on an issue which has been previously litigated. An issue has been previously litigated if the highest appellate court in which petitioner could have review as a matter of right has ruled on the merits of the issue. 42 Pa.C.S.A. §9544(a)(2) or has been raised and decided in a proceeding collaterally attacking the conviction or sentence. 42 Pa.C.S.A. §9544(a)(3). Here the identical issue was not only raised and decided in a collateral proceeding but also reviewed by the Superior Court and decided against petitioner. Clearly, he is not entitled to a new trial on this basis.

Further, a review of the record of both the guilty plea colloquy and the collateral proceeding reveals that there are no issues of arguable merit. Petitioner's guilty plea colloquy was thorough and complete, petitioner answered every question indicating that he understood and there is no showing on the record of the previous collateral proceedings that petitioner was misled by trial counsel. Accordingly, petitioner is not entitled to relief on this basis.

For the reasons set forth herein the instant PCRA petition was denied.

/s/ Savitt
J.

BY CERTIFIED MAIL

TO: PETITIONER
FROM: THE HONORABLE David N. Savitt
RE: COMMONWEALTH V. John Pace
C.P. 8510-1272
P.C.R.A.

DATE: July 25, 1997

On July 23, 1997, your attorney submitted a *Finley* letter to the Court, explaining that there were no issues of arguable merit in your PCRA petition. Based on my review of the letter and the file, I dismissed your petition. You have thirty (30) days from the date of the order to file a notice of appeal to the Superior Court of Pennsylvania. The notice must be in writing and must be filed in Room 206 Criminal Justice Center, 1301 Filbert St., Philadelphia, PA 19107. Because your case was dismissed after your attorney submitted a *Finley* letter, you are no longer entitled to an attorney free of charge. You can file the notice of appeal on your own or you can hire an attorney.

cc: Defense Counsel, David Belmont Esq.
Christopher Diviny, Chief, Motions Unit,
District Attorney's Office

DEFENDANT MUST FILE AN ORIGINAL AND
ONE COPY OF:
Notice of Appeal
Proof of Service
Verified Statement

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRIST

COMMONWEALTH OF PENNSYLVANIA,
Appelle

vs.

JOHN A. PACE,
Appellant

Philadelphia 1997
No. 03642

APPELLANT'S BRIEF

(Filed Apr. 8, 1998)

Appeal from the ORDER of the Honorable David N. Savitt filed July 23, 1997, in the Court of Common Pleas, Criminal Trial Divion, which denied appellant's Post Conviction Relief Petition.

John A. Pace, AY 6445
P.O. Box 244
Graterford, Pennsylvania 19426

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STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Court pursuant to title *42 Pa. C.S.A. §742;* and *Pa.R.A.P 341 (a).*

ORDER IN QUESTION

The Order of Judgment of The Honorable David N. Savitt, filed July 23, 1997, in the Court of Common Pleas which accepted attorney David Belmont's Turner/Finley no-merit letter and request to withdraw as appellant's attorney. And his dismissal of appellant's Post Conviction Collateral petition asking for relief on CP# No. 8510-1272.

QUESTIONS PRESENTED

Did the Post-Conviction Court err when it granted attorney David Belmont's Turner/Finley no-merit letter to withdraw, thus dismissing the petitioner's petition under the Post-Conviction Collateral Relief Act, in which he avers the following:

1. Terms of life imprisonment imposed without a discretionary minimum term for parole eligibility for crimes except first and second degree arson-murder are illegal.

2. Guilty plea colloquy that failed to ensure petitioner understood consequences of plea compels withdrawal of plea.

3. Ineffective assistance of counsel at all levels of representation resulted in denial of due process and a miscarriage of justice.

ANSWER BELOW: NOT ANSWERED

STATEMENT OF THE CASE

PROCEDURAL HISTORY:

The petitioner, who was seventeen at the time, having previously been charged with murder and related offenses, was assigned to The Honorable David Savitt for trial on February 13, 1986. At that time, the petitioner entered a plea to murder in the second degree and thereafter, and on the same date, was sentenced to mandatory life in prison. At trial, the defendant was represented by counsel Moira Dunworth and after trial, no direct appeal was taken. On or about August 21, 1986, the petitioner filed a petition under the Post-Conviction Hearing Act and thereafter, Franklin D. Green, Esquire, was appointed to represent petitioner. An Amended Petition was filed on March 31, 1987 alleging trial counsel's ineffectiveness. Thereafter, a motion to Dismiss hearing was held in Room 788 city Hall on January 11, 1988, before The Honorable Joseph D. O'Keefe. On July 25, 1988, an evidentiary hearing was granted and scheduled for November 15, 1988. Thereafter, Mr. Green withdrew, apparently for personal reasons, and then attorney David S. Rudenstein was appointed. Attorney Rudenstein then filed his own Amended P.C.R.A. Petition, which after a hearing before The Honorable James D. McCrudden was Ordered dismissed without any further hearings on July 23, 1991. An appeal was filed October 10, 1991 by attorney David S. Rudenstein, alleging trial counsel's ineffectiveness and The Honorable James McCrudden err by dismissing petitioner's P.C.H.A. Petition.

On March 30, 1992, the Superior Court affirmed the lower courts decision. May 27, 1992, petitioner filed pro se a "Petition for *Permission* to file Petition for Allowance of

Appeal Nunc Pro Tunc." September 3, 1992, the Supreme Ordered this petition denied. Petitioner then filed a P.C.R.A. petition November 27, 1996, his second Post Conviction Collateral Relief Petition. Thereafter, attorney David Belmont was appointed to represent petitioner on his P.C.R.A. Petition. On June 17, 1997, petitioner was notified by counsel David Belmont that he had filed a Turner/Finley no-merit letter and asked for permission to withdraw from representing petitioner's P.C.R.A. petition. On June 17, 1997, petitioner received letter from The Honorable David Savitt, indicating that his petition would be dismissed, but that petitioner have ten (10) days to respond to the notice. On July 7, 1997, petitioner filed a motion objecting to attorney David Belmont's Finley Letter and the court's intent to dismiss. July 23, 1997 petitioner's P.C.R.A petition was Ordered dismissed by The Honorable David S. Savitt

SUMMARY OF THE ARGUMENTS

The Post Conviction Court erred when it granted PCRA counsel David Belmont's Finley no-merit letter and request to withdraw, and an its dismissal of petitioner's PCRA petition. In accordance with *Ander v. California* and *Commonwealth v. Finley,* counsel Belmont failed to set forth in his *Finley Brief* all of the issues raised by petitioner and the reasons they are not of arguable merit. Judge Savitt failed to thoroughly evaluate petitioner's issues, counsel's finley brief, and require counsel Belmont to address all of petitioner's issues averring the following:

Terms of life imprisonment imposed without a discretionary minimum term for parole eligibility for crimes except first and second degree arson-murder are illegal.

Trial Judge sentence the petitioner to a term of life imprisonment without a discretionary minimum for parole eligibility, which violates his right to a minimum term and parole eligibility, as established by 42 Pa.C.S., § 9756(c).

Guilty plea colloquy that failed to ensure petitioner understood consequences of plea compels withdrawal of plea. Trial Judge failed to inform the petitioner that by pleading guilty to second-degree murder, that he would receive a mandatory minimum sentence of life *without parole*, a violation of the requirements of Pa.R.Crim.P. 319 and the due process provisions of the Constitutions of the United States and Pennsylvania. Moreover, trial counsel misinformed the petitioner of the consequences of his plea by telling him that he would he paroled after serving 10 to 15 years.

Ineffective assistance of counsel at all levels of representation resulted in denial of due process and a miscarriage of justice. Trial counsel was ineffective and did not act in petitioner's best interest by inducing him to plead guilty to second-degree murder and failing to inform the trial court that it erred by accepting the petitioner's guilty plea without informing or ensuring that he understand that he would receive a mandatory minimum sentence of *life without parole.* As well, trial counsel failed to take an immediate appeal to have the petitioner's guilty plea withdrew when she knew of the court's err. PCRA counsel David Rudenstein was ineffective in failing to subpoena trial counsel at the evidentiary hearing held March 26, 1991 to testify about her ineffectiveness, when she admitted to him previously, via the telephone, that she didn't explain to the petitioner that he would be receiving a mandatory minimum sentence of life without parole. Thus,

creating a miscarriage of justice that no civilized society can tolerate.

ARGUMENT

POINT I

TERMS OF LIFE IMPRISONMENT IMPOSED WITHOUT A DISCRETIONARY MINIMUM TERM FOR PAROLE ELIGIBILITY FOR CRIMES EXCEPT FIRST AND SECOND DEGREE ARSON-MURDER ARE ILLEGAL.

The petitioner's appellate argument is straight forward and simple, to wit, that the PCRA Judge David N. Savitt erred when it granted PCRA counsel David Belmont's finley no-merit letter and when he dismissed the petitioner's Post Conviction Collateral Relief petition. The petitioner challenges the legality of his life imprisonment sentence without a discretionary minimum term for parole eligibility, which is an illegal sentence. This issue has never been raised before by the petitioner, nor is it considered waived, because it is essentially an attack on the legality of the sentence, which is illegal, and would entitle to the petitioner to an explicit minimum term that will engender parole eligibility.

In accordance with *Commonwealth v. Finley,* 330 Pa. 313 479 A. 2d 568 (1984), which have adopted the procedures established in *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), counsel when requesting to withdraw his presentation of the Defendant, must do so with an accompanying brief listing each issue Defendant wished to have raised, followed by an explanation why those issues were meritless. In this instant case, petitioner challenges the legality of his life sentence

without a discretionary minimum term. This issue is raised in the *"Post Conviction Relief Act Petition"* pg 2-3 (10)(c), and *"Memorandum of Law"* pg 1-13. But not only do counsel Belmont fail to explain why this issue raised by petitioner is without merit, he makes no mention of this issue raised by the petitioner. Again, in accordance with *Commonwealth v. Finley,* supra, at 570, Judge Savitt should have concluded after his independent review or full examination of the record, that counsel Belmont's request to withdraw his representation should be dismissed. He should at best, required counsel to address petitioner's issue. So Judge David Savitt erred when he granted counsel David Belmont's request to withdraw, and thus dismissing the petitioner's Post Conviction Relief Act petition. The Petitioner's issue is as follow:

This issue is limited solely to sentence rather than conviction, this is a challenge to the legality and constitutionality of the mandatory sentence imposed and, therefore, could not have been waived. 42 Pa.C.S.A. § 9781(a); *Commonwealth v. Campbell,* 351 Pa.Super. 56, 505 A.2d 262 (1986). Where the court failed to inform the defendant of his right to file a motion challenging the propriety of a mandatory sentence of life imprisonment without parole, the issue of the constitutionality of a life sentence has not been waived because it is essentially an attack on the legality of the sentence. *Commonwealth v. Middleton,* 320 Pa.Super. 533, 543 n. 5; 467 A.2d 841 (1983); Pennsylvania Rules of Criminal Procedure, Rule 1405(c)(2).

The Honorable Judge Savitt sentenced Defendant Pace to a term of life imprisonment for second degree murder without an established minimum sentence for parole eligibility. Assuming, for the sake of this argument only, that the court properly sentenced the Defendant to a

life term, in failing to set a minimum sentence the court violated his statutory right to parole eligibility as established by 42 Pa.C.S., § 9756(c). That section provides:

> (c) Prohibition of Parole. – Except in the case of murder of the first degree, the court may impose a sentence to imprisonment without the right to parole only when:
>
> (1) a summary offense is charged;
>
> (2) sentence is imposed for nonpayment of fines or costs, or both, in which case the sentence shall specify the number of days to be served; and
>
> (3) the maximum term or terms of imprisonment imposed on one or more indictments to run consecutively or concurrently total less than 30 days.

Because Pace was not convicted of first degree murder, and none of the other exceptions within 9756(c) applies in his case, he was entitled under the plain statutory language to have the court set a minimum sentence which, under § 9756(c), could not exceed one-half the maximum, thus defining a parole eligibility date. 1 Pa.C.S. § 1924. ("Exceptions expressed in a statute shall be construed to exclude all others.") As held in *Commonwealth v. Bell,* 512 Pa. 334, 516 A.2d 1172, 1175 (1986), applying 1 Pa.C.S. § 1921(b), when statutory language is clear, the judiciary must read the provisions of a sentencing statute in accordance with plain meaning and usage.

Although § 9756(c) is free of ambiguity in and of itself, it must be read in connection with another statute which, on its face, prohibits the Pennsylvania Board of Probation and Parole from exercising its power to release on parole

any person serving life imprisonment. That statute, 61 Pa.Stat. Section 331. 21, provides that:

> The board is hereby authorized to release on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to said board, except convicts condemned to death or serving life imprisonment. . . .

Another statute, 61 Pa.Stat. § 331.17, bestows on the parole board the "exclusive power to parole," and does not exclude cases in which the sentence imposed was life imprisonment.

Sections 9756(c) of Title 42 and 331. 21 of Purdon's Title 61, although codified in different titles of the Pennsylvania penal law, are statutes "*in pari materia*" because they "relate to the same persons or things or to the same class of persons or things." 1 Pa.C.S. § 1932(a). Such statutes "shall be construed together, if possible, under one statute." *Id.* at (b). Indeed, under this definition all of the statutes within Pennsylvania's Crimes Code which pertain to sentences of life imprisonment are "*in pari materia*" with one another and with the relevant sections of Title 61, and should be read together, in a manner that, "if possible, [gives] effect to all [their] provisions." 1 Pa.C.S. § 1921(a).

At first reading 42 Pa.C.S. § 9756(c) and 61 Pa.Stat. 331.21 might appear to be in irreconcilable conflict. The former prohibits the court from sentencing a defendant convicted of a degree of murder other than first degree, some of whom, like the Defendant have been convicted of second degree murder and face life sentences, to a non parole eligible sentence; the latter prohibits the parole

board from releasing prisoners serving life terms. Yet read and applied in relation to the pertinent portions of the Crimes Code and according to the Commonwealth's codified principles of statutory construction, the two statutes are, in fact, reconcilable.

There are two methods of reconciling the statutes to give both of them effect. The first is to recognize that in 1941, when the Title 61 provisions were enacted, Act of August 6, 1941, P.L. 861, the offense of murder of the first degree was the only offense for which a term of life imprisonment was provided. Section 9756(c) was not enacted until 1974. Act of Dec. 30, P.L. 1052, No. 345, transferred to Title 42 and recodified by Act of Oct. 5, 1980, P.L. 693, No. 142, § 401(a). Giving effect to the language of § 9756(c), it becomes clear the General Assembly did not intend to extend the reach of § 331.21 to cover life sentences imposed in other than first degree murder cases. Thus, the enactment of what is now § 9756(c) as part of the same 1974 criminal code reform that separated felony murder from willful and premeditated murder establishes parole eligibility in those cases.

The other method of reconciling Sections 9756(c) and 331.21 involves a careful examination of the life terms provided in the Crimes Code. The legislature has specified that the terms of life imprisonment provided for certain aggravated types of murder shall be without parole. For examples, 18 Pa.C.S. § 3301(b) provides that "[a] person convicted of violating the provision of subsection (a)(2) [first degree murder by person committing arson] shall be sentenced to death or life imprisonment *without right to parole*" the same is provided for arson-related murder in the second degree. In contrast, in section 1102(b), under

which Pace was sentenced, no such prohibition appears, nor does it in 18 Pa.C.S. § 1102(a), which provides a term of life imprisonment for murder in the first degree. This demonstrates that the legislature was explicit about prohibiting parole where it intended to do so. *Cf.* 1 Pa.C.S. Section 1924 ("Exceptions expressed in a statute shall be construed to exclude all others.") It did not intend to bar for life terms imposed, *inter alia,* under Section 1102(b).

When this statutory scheme is construed with sections 9756(c) and 331.21, it becomes clear that where the latter section provides parole release for "convicts . . . serving life imprisonment," it must be read as referring to those offenses for which the legislature has specified terms of life imprisonment without right to parole. This reading that "[w]henever a general provision in a statute [the provision in section 331.21] shall be in conflict with a special provision in . . . another statute [the opposite prohibition in Section 9756(c)], the two shall be construed, if possible, so that effect may be given to both." 1 Pa.C.S. Section 1933.

Alternatively, Sections 9756(c) and 331.21 may be seen as irreconcilable. The principle of statutory construction that statute "*in pari materia*" should be construed together is not absolute; the statute says this shall be done "if possible." 1 Pa.C.S. Section 1932(b). If it is not possible to give effect to both of these statutes, then Section 331.21, as it pertains to persons serving life sentences for all offenses except first degree murder, must be seen as implicitly repealed, in pertinent part, by the later-enacted Section 9756(c). Under 1 Pa.C.S. Section 1936, "[w]henever the provisions of two or more statutes enacted finally by different General Assemblies are irreconcilable, the statute latest in date of final enactment shall prevail." See

also 1 Pa.C.S. section 1971 ("a later statute shall not be construed to supply [sic] or repeal an earlier statute unless the two statutes are irreconcilable." Section 9756(c) of Title 42 was enacted after Section 331.21 of Title 61, as discussed above. See also 1 Pa.C.S. section 1928(b)(1) (penal provisions shall be strictly construed); *Commonwealth v. Darush*, 256 Pa.Super. 344, 389 A.2d 1165, 1158 (1978) (strict construction is in favor of defendant); *Commonwealth v. Cluck*, 252 Pa.Super. 228, 381 A.2d 472, 477 (1977) (any ambiguity in penal statutes must be resolved in favor of life and liberty).

In *Castle v. Pennsylvania Board of Probation and Parole,* 123 Pa.Comw. 570, 554 A.2d 625 (1999), *all app. denied,* 567 A.2d 653 (1989), an action by a prisoner to compel the scheduling of a parole hearing, the other intermediate appellate court rejected the argument that section 9756(c) gave the defendant, there serving a life sentence for second-degree murder, a right to parole consideration and thereby impliedly repealed the contrary provisions in 61 Pa.Stat. Section 331.21. *Id.* at 628-29. The basis of its decision was the asserted lack of a stated purpose of Section 9756 to create parole eligibility, and the fact that the section only governs action by the trial court and not the parole board, whereas Section 331.21 prohibits the board from paroling prisoners serving life terms. *Id.* For these reasons, the court did not find the two statutes "clearly irreconcilable," a prerequisite for finding repeal by implication. *Id.* at 629.

This court should decline to follow *Castle* here for two reasons. First, the *Castle* court was incorrect in stating that Section 9756 did not have as its purpose the creation of parole eligibility. Subsection (c) of that section is entitled "Prohibition of Parole," and expressly concerns parole

eligibility. It lists specific instances in which the court may sentence without the right to parole, stating that these are the "only" such instances. In light of the codified principle of statutory construction that exceptions expressed in a statute exclude all others, 1 Pa.C.S Section 1924, it is clear that this subsection had as its purpose to and did create parole eligibility for all offenses not specified.

Second, because the General Assembly did intend Section 9756(c) to create parole eligibility, the *Castle* court was wrong in deciding that it was not irreconcilable with Section 331.21. Thus, we are left with the anomaly of one statute providing a right to parole, and another prohibiting the only body empowered to release on parole from doing so. It is presumed that the "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S. Section 1922(1). The result of *Castle* is all three of these. In any event, this appeal *does* concern action of the sentencing court, which *is* expressly bound by Section 9756(b) and (c). Thus, at the least, this case may be readily distinguished on that basis.

All sentences imposed in Pennsylvania are for the maximum sentence. Maximum sentences are the "legal and valid" sentences imposed. *Commonwealth v. Daniels,* 430 Pa. 442, 243 A.2d 400 (1968). "The word 'sentence' when unmodified by the word 'maximum' or 'minimum' necessarily refers only to the maximum sentence for that is the legal sentence." *Commonwealth v. Glover,* 397 Pa. 543, 546-47, 156 A.2d 114 (1959). "The legislature has the right to fix the maximum penalty and likewise can, if it see fit, name the minimum." *Id.* at 5454. "When the legislature has desired to provide for a mandatory minimum in the past it has done so in unequivocal language." *Id.* at 547. The General Assembly has confirmed the

Glover Court's analysis by subsequently adopting the Mandatory Minimum Sentencing Act, 42 Pa.C.S.A. Sections 9712, 9713, 9714, in which specific sentences are deemed to be mandatory minimum sentences, none of which include sentences of life imprisonment. If minimum sentences 'are not implicated much less mandated by the sentencing statute, then the discretion of the trial court is necessarily the controlling factor.' *Commonwealth v. Button,* 332 Pa. Super. 239, 244; 481 A.2d 342 (1984).

The legislature clearly intended to distinguish punishment for first – degree murder and second – degree felony murder from other criminal offenses, a goal accomplished by

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are not precluded from the benefit of 19 P.S. Section 1057:

> Whenever any person, convicted in any court of this Commonwealth of any crime punishable by imprisonment in a state penitentiary ... the court ... shall pronounce upon such convict a sentence of imprisonment for an indefinite term stating in such sentence the minimum and maximum limits thereof ..."

Commonwealth v. Bulter, supra., at 291. The only parameters placed upon the minimum sentence to be imposed by the court is that "the minimum shall never exceed one-half of the maximum sentence." 19 P.S. Section 1057; 42 Pa.C.S.A. Section 9756(b). This implies that the only minimum sentence precluded by these statutes when the maximum sentence is life imprisonment is "life" itself, the very sentence presumed by the judiciary and administrative agencies.

Certainly a sentencing court may not sentence one convicted of second-degree felony murder to a lesser *maximum* sentence than life imprisonment. The *Castle* court erred by assuming that sentences of life imprisonment are other than simply maximum sentences. Given that two purposes of the Crimes Code, 18 Pa.C.S.A. Section 104(3)(5), effective June 6, 1973, are to "safeguard offenders against excessive, disproportionate, and arbitrary punishment" and "to differentiate among offenders with a view to just individualization in their treatment," and that components of the Crimes Code are to be construed in terms of these purposes, it is necessary to reconcile 18 P.S. Section 4701, 19 P.S. Section 1057, 18 Pa.C.S.A. 1102, 1321(e) and 2502, 42 Pa.C.S.A. Section 9711 and 9756, inasmuch as none preclude another. "While [parole] is an amelioration of punishment, *it is in legal effect imprisonment. Commonwealth ex rel. Banks v. Cain,* 345 Pa. 581, 589; 28 A.2d 897 (1942); *Anderson v. Corall,* 26 U.S. 193, 196; 44 S.CT. 43 (1923). If, under Pennsylvania law, a sentence to a five to ten year term of imprisonment is construed a ten-year sentence, *United States ex rel. McNeils v. Pa. Board of Parole.,* 141 F.Supp. 23 (1956), a sentence of one day to life imprisonment must be considered a sentence of life imprisonment and, therefore, in compliance with the foregoing statutes.

An overview of the foregoing statutes, either individually or *in pari materia,* raises reasonable constructions that favor life and liberty much more than past and current interpretations. First, the parole Act, adopted August 6, 1941, and amended to create the Pennsylvania Board of Probation and Parole December 27, 1965, has been explicitly repealed insofar as it is inconsistent with subsequent legislation, that is, with the phase 'or serving

life imprisonment,' as found at 61 P.S. Section 331.21. The most noteworthy statutory refinement regarding parole eligibility for sentences of life imprisonment is found in the clear and concise language of 42 Pa.C.S.A. Section 9756, effective March 30, 1975. In Section 9756(c), the General Assembly very succinctly defined these offenders to whom parole eligibility *must* be afforded and those to whom the right to parole *may* be provided. Even the most cursory perusal of Section 9756(c) dictates the conclusion that, except for four (4) specific categories of offenses, the court may impose a sentence with parole eligibility. Conspicuously absent from that group of four offenses are second-degree felony murder [18 Pa.C.S.A. Section 1102(b)], and a subsequent conviction for an unrelated homicide [42 Pa. C.S.A. Section 9715], all of which mandate a sentence of life imprisonment. "A change of language in subsequent statutes on the same matter indicates a change of legislative intent." *Haughey v. Dillon*, 379 Pa. 1, 6; 108 A.2d 69 (1954); *Commonwealth v. Garcia*, 474 Pa. 449, 477; 378 A.2d 1199 (1977). Therefore, if the court properly sentenced Defendant Pace to a life term, it violated 42 Pa.C.S. Section 9756(b) and (c) by failing to to set a minimum sentence, at the completion of which Defendant would be eligible to parole.

ARGUMENT

POINT II

GUILTY PLEA COLLOQUY THAT FAILED TO ENSURE PETITIONER UNDERSTOOD CONSEQUENCES OF PLEA COMPELS WITHDRAWAL OF PLEA.

Petitioner entered a plea of guilty in open court to the charges of second-degree murder and possession of an

instrument of crime. Petitioner subsequently received a life sentence without a stated minimum sentence for parole eligibility. Both the court and trial counsel failed to ascertain on the record whether Petitioner understood the nature and consequences of his guilty plea. Such a defective colloquy violated the requirements of Pa.R.Crim.P. 319 and the due process provision of the Constitutions of the United States and Pennsylvania, and compels withdrawal of Petitioner's Plea.

Moreover, trial counsel misinformed Petitioner and his family that he would be eligible for parole after serving 10 to 15 years in the state prison system. Prior to Petitioner entering his guilty plea, counsel Dunworth met with Petitioner's biological parents and brother to discuss the Petitioner's case and secure the family's support, since the Petitioner was still a juvenile. Attorney Dunworth informed Petitioner's family that it was her professional opinion that the Petitioner should plead guilty to second degree murder. Attorney Dunworth also informed the family that the Petitioner would have to serve 10 to 15 years before he would be eligible for parole. Based on their understanding of counsel's statements, the family advised the Petitioner to plead guilty to second degree murder. [See Affidavits at Exhibits A, B and C]. Petitioner, who was 17 at the time, would not have plead guilty had he known that he would have to spend the remainder of his life behind bars without becoming eligible for parole. As well, trial counsel admitted to the Petitioner's former court appointed PCRA counsel David Rudenstein of her failure to properly advise Petitioner and his family of the consequences of his plea to second-degree murder; simply because, "she had an emotional time dealing the Petitioner

and his family as a prospect of serving a life sentence." [See Exhibit D].

This issue has not beenlitigated before, nor should it be considered waived, because the Superior Court did not determine until 1992, in a case characterized as one of "first impression," that a sentence of life imprisonment is a *mandatory minimum* term, see *Commonwealth v Yount*, 615 A.2d 1316 19-21., thus precluding a challenge to this holding prior to 1992. Therefore, Judge Savitt erred when he permitted court appointed PCRA counsel David Belmont to withdraw his representation without amending Petitioner's PCRA petition, or requiring that counsel in his *Finley brief* show reasons why Petitioner's issue is without merit. Additionally, Judge Savitt failed to state in his opinion denying Petitioner's PCRA petition, reasons this particular issue is without merit. Judge Savitt fails to even make mention that the Petitioner raised this issue in his *Post Convict Relief Act petition*, supra. at pgs. 2-3 (10)(a) (11)(a) and *Memorandum of Law*, supra. at pgs. 13-21. Judge Savitt should have examined the record and than determine if the issue raised was wholly frivolous. *See*, *Commonwealth v. Finley*, supra, at 570.

Petitioner argument is that if the conclusion of the *castle* Court that terms of life imprisonment imposed are mandatory minimum sentences, then the Honorable Court erred by accepting Petitioner's guilty plea without informing him or insuring that he understood that a consequences of his plea would be a term of life imprisonment without parole. Petitioner did not know that a consequence of his plea would be to spend the remainder of his life behind bars without becoming eligible for parole. Had he known, he would not have pleaded guilty. Such a defective colloquy violated the requirements of

Pa.R.Crim.P. 319 and the due process provisions of the Constitutions of the United States and Pennsylvania, and compels withdrawal of Petitioner's plea.

The United States Supreme Court has consistently applied stringent standards for testing the validity of a guilty plea; that is, that it was made voluntarily after proper advice and with full understanding of the consequences of the plea. *McCarthy v. United States,* 394 U.S. 459, 89 S.Ct. 1166 (1969).

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable of canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences.

Boykin v. Alabama, 385 U.S. 238, 244; 89 S.Ct. 1709, 1712 (1969).

Pa.R.Crim.P. 319, the goal of which is "assurance that a defendant's guilty plea is tendered-knowing, intelligently, voluntarily and understandingly," *Commonwealth v. Persinger,* 532 Pa. 317, 322, 615 A.2d 1305 (1992), is but a restatement of this constitutional principle as well as existing law and practice. As the Third Circuit has said:

> We therefore reach the same conclusion as did the Ninth Circuit in *Munich v. United States,* 337 F.2d 356 (1964): "[O]ne who, at the time of entering a plea of guilty, is not aware of the fact that he would not be eligible for probation or parole, does not plead with understanding of the consequences of such a plea."

Berry v. United States, 312 F.2d 189, 193 (3rd Cir. 1969). Thus, failure to advise Petitioner of the Consequences of

his plea – ineligibility for parole – is equal to a denial of due process. "[P]rejudice inheres when an accused pleads guilty, thus convicting himself of a criminal offense, without understanding the significance or consequences of his action." *Id.* at 191.

The mandate of Pa.R.Crim.P. 319, as well as its federal counterpart, Fed.R.Crim.P.11, is designed to ensure that the pleader is apprised, at the very least, of the period of *required* incarceration. Loss of parole eligibility is "an inseparable ingredient of the punishment imposed." *Id.* at 192; *In re Grand Jury Investigation,* 542 F.2d 166, 173 (3rd Cir. 1976), *cert. denied,* 429 U.S. 1047 (1977). Failure to impart information regarding "the worst to expect," in term of imprisonment is a failure to explain the consequences of a plea. *Roberts v. United States,* 491 F.2d 1236, 1238 (3rd Cir. 1974). The worst conceivable term of imprisonment is life imprisonment without parole.

Ordinarily, it would not be necessary for a trial court to include an explanation of probation or parole in its inquiry into a defendant's understanding of his plea. However, circumstances surrounding a plea that mandates a sentences of life imprisonment without the possibility of parole in not ordinary. The particular status of such defendants bring into mechanical operation a legislative directive severely restricting the freedom of action of the sentencing judge as well as the parole authority. "Under such circumstances, the knowledge of ineligibility for parole is as necessary to an understanding of the plea as is the knowledge of the maximum sentence possible." *Berry v. United States,* 412 F.2d 189, 192-193 (3rd Cir. 1969).

This constitutional principle was applied to Pennsylvania law by the Third Circuit Court of Appeals in *United*

States ex rel. Crosby v. Brierley, 404 F.2d 790 (3rd Cir. 1968), *overruled by United States ex rel. Grays v. Rundle,* 428 F.2d 1401 (3rd Cir. 1970). The *crosby* Court stated that Pa.R.Crim.P 319 anticipates:

> . . . an inquiry of the defendant to form the factual basis that the plea is "competently and intelligently made". . . . Trial courts have a duty . . . to insure that the defendant understands the consequences of his plea. This is not so much the result of promulgations of federal and state rules of criminal procedure as it is a part of the basic concepts of proper judicial administration in Pennsylvania. . . .

Id. at 794. The rationale of *Berry,* that failure to advise a defendant, prior to acceptance of guilty plea, of ineligibility for parole denies due process, was adopted by the Pennsylvania Supreme Court in *Commonwealth v. Zuber,* 466 Pa. 453, 461; 353 A.2d 441, 445 (1976).

The mandatory nature of Rule 319 was clearly established in *Commonwealth v. Ingram,* 455 Pa. 198, 316 A.2d 77 (1977). Other cases indicate that six specific areas of inquiry must be explored, the most relevant being whether the defendant is aware of the permissible range of sentences for the offenses charged. *Commonwealth v. Willis,* 417 Pa. 50, 52, 369 A.2d 1189 (1977); *Commonwealth v. Fay,* 294 Pa. Super. 332, 337, 439 A.2d 1227 (1982). Lack of such inquiry or notice deprives the defendant of "the right to weigh the alternatives of going to trial versus entering a guilty plea . . . because of the real possibility . . . that he was misled or acted pursuant to inaccurate or incorrect information" [*Commonwealth v. Leonhart,* 358 Pa. Super. 494, 501, 517 A. 2d 1342 (1986)] and require that the defendant be allowed to withdraw his guilty plea.

Commonwealth v. Kulp, 476 Pa. 358, 382 A.2d 1209 (1978). Before accepting a plea of guilty, the court must insure that the defendant understands the meaning of words like "consecutive". *Commonwealth v. Guyton*, 331 Pa. Super. 231, 480 A.2d 330 (1984). No less important are words and phases like *life imprisonment* and *mandatory minimum sentences*. "[N]o plea be viewed as voluntary that is the product of ignorance." *Commonwealth ex rel. West v. Myers*, 423 Pa. 1, 5-6, 222 A. 2d 918 (1966).

The explicit purpose of the Crimes Code, "to give fair warning . . . of the sentences that may be imposed on conviction of an offense," is relevant. 18 Pa.C.S. § 104(4). Significantly, the ABA Standards For Criminal Justice, Second Edition at 14-1.4, provides the following:

> (a) the Court should not accept a plea of guilty . . . from a defendant without first addressing the defendant personally in open court and determining that the defendant understands:
>
> . . . . (ii) the maximum possible sentence on the charge, including that possible from consecutive sentences, and the *mandatory minimum sentence*, if any, on the charge, or any special circumstances affecting probation or release from incarceration. (emphasis added)

Commonwealth v. Persinger, 532 Pa at 323-24, held that the reasoning behind the above Standard is sound because it insures that the defendant appreciates the significance and consequences of his plea. See also *Commonwealth v. Fay*, 294 Pa.Super. at 237. The *Persinger* Court went on to hold that failure of the trial court to abide by this standard results in the defendant suffering *manifest injustice*. Petitioner contends that such miscarriage of

justice mandates that neither "delay" nor "multiple petitions" bar PCRA or federal habeas corpus challenges to this denial of due process.

Analogous to 42 Pa.C.S. § 9718, Sections 4701, 1102, 2704, and 9715 contain no notice requirement prior to imposition of a mandatory minimum term of life imprisonment. However, "there can be no mistake that notice of intention to pursue a mandatory minimum sentence under § 9718 is necessary . . . before acceptance of guilty plea. Moreover, it is clear that such a requirement is born not of legislative enactment, but rather from judicial interpretation of due process guarantees whose purposes are to inform defendant of *all* of the consequences of entering a guilty plea before the act has become *fait accompli* . . . What is important is that Appellant was made aware of the consequences of his action *prior* to the acceptances of his plea." *Commonwealth v. Boyles*, 414 Pa.Super. 282, 293, 606 A.2d 1201.

A guilty plea may be attacked after sentencing on three grounds: legality of sentence, jurisdiction of the court, and the voluntary, knowing, and intelligent nature of the guilty plea itself. *Commonwealth v. Alston*, 387 Pa.Super. 393, 564 A.2d 235 (1989). In determining whether a guilty plea is voluntarily and understandingly entered, it is mandatory that the court ask questions to ascertain the defendant's awareness of the permissible range of sentences. *Commonwealth v. Persinger*, 532 Pa. at 321. The absence of this inquiry from the transcripts renders the colloquy defective which, in turn, provides adequate grounds for withdrawal of the plea. Counsel's failure to seek withdrawal of Petitioner's plea was, therefore, prejudicial to Petition. *Id.* at 234

In the instant case, the Honorable Court failed to advise Petitioner that a consequence of his plea would be a mandatory minimum term of life imprisonment. The Court only made reference to the maximum penalty:

> Q [THE COURT]: If I find you guilty or if I accept the plea to second degree murder, you must know that the sentence is life imprisonment. Do you understand that? A Yes.

TT: 43, Petitioner was unaware that the forfeiture of his right to a trial by jury would result in his removal from society, without eligibility for parole, for the remainder of his life. The Courts in *Commonwealth v. Carey*, 235 Pa.Superior Ct. 366, 371-72 340 A.2d 509-11 (1975) and *Commonwealth v. Byng*, 364 Pa. Superior Ct. 636 (1987) states that the voluntariness of a waiver may be vitiated by misrepresentation as to sentencing if the defendant is shown to have relied on the misrepresentation when making the decision to waive a jury trial.

That Petitioner was misinformed about the consequences of his plea is also evident by the comments guilty plea Attorney Dunworth made to Petitioner's PCRA/ Superior Court counsel, David S. Rudenstein:

> .... your prior counsel admitted to me on the telephone that she did not explain Life was Life without parole simply because she had a very difficult emotional time dealing with such a prospect for you and your family.

[See Exhibit D, supra]. Attorney Dunworth's states to Attorney Rudenstein makes it clear that she did not inform Petitioner that he was pleading guilty to a life sentence without parole eligibility. Moreover, her statements to both the Petitioner and his family [See exhibits

A, B and C, supra.] that he would be eligible for parole sometime after serving ten to fifthteen years was completely misleading and inaccurate to Petitioner. In *Strader v. Garrison,* 611 F.2d 61, 65 (1979), the Forth Circuit held that, "[T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel;" see *Sparks v. Sowders,* 852 F.882, 885 (6th Cir. 1988).

Whether the Court was aware or unaware that Petitioner Pace's understand was factually and legally incorrect may be irrelevant. What is relevant is that the Court allowed Petitioner to plead guilty believing he would be eligible for release after serving a certain amount of time. Had Petitioner known of the true and correct nature of the penalty, he would not have plead guilty. The Court's acceptance of his guilty plea under these circumstances and others, then was a complete miscarriage of justice warranting the withdrawal of the plea because before a guilty plea is accepted, a defendant must be aware of the outer limits of the punishment and the full consequences of the plea.

ARGUMENT

POINT III

INEFFECTIVE ASSISTANCE OF COUNSEL AT ALL LEVELS OF REPRESENTATION RESULTED IN DENIAL OF DUE PROCESS.

The threshold inquiry into claims of ineffective assistance of counsel is: (1) does the underlying issue have

merit, (2) was the course chosen by counsel designed to effect Petitioner's interest, and (3) did counsel's omission prejudice Petitioner. *Commonwealth v. Persinger,* supra. 532 Pa. at 321.

In addition to the substantive defects in the plea colloquy set out previously, Petitioner contends that trial counsel was ineffective for failing to correct these defects prior to the entry of his plea. This ineffective assistance of counsel caused Petitioner to enter his plea unknowingly, unintelligently, involuntarily, and without a full understanding of the consequences.

Trial counsel was ineffective for failing to insure that the Petitioner, who was 17 years old at the time, understood the terms and consequences of the plea, explain or have the court explain that a life sentence was a mandatory minimum sentence without parole eligibility, challenge the legality of the life sentence without a stated minimum sentence for parole eligibility, and file an appeal. Additionally, counsel's misleading and inaccurate statements to the Petitioner and his family that he would be eligible for parole after serving ten to fifteen years violated Petitioner's constitutional right to competent and effective counsel. As a result of this ineffectiveness, Petitioner entered his plea without a full understanding of the consequences, in violation of his constitutional rights. Trial counsel's derelictions were not reasonably designed to advance Petitioner's interests. In fact, counsel's deficient performance caused Petitioner to enter his plea unknowingly and involuntarily. See *Commonwealth v Persinger,* supra. at 323-24. As the purpose of the plea colloquy is to insure that a defendant enters his plea knowingly, intelligently, and voluntarily, it can not be said that trial counsel advanced Petitioner's interests when her

deficient performance prevented this from occurring. For similar reasons, Petitioner was prejudiced by counsel's ineffective assistance, as counsel's deficient performance led him to enter the plea unknowingly and involuntarily, thereby depriving him of his constitutional right to a jury trial. Counsel's ineffectiveness further prejudiced Petitioner in that he has spent the past 12½ years in prison as a result of a conviction that resulted from a defective and unlawfully induced guilty plea.

Thereafter, trial counsel was ineffective, for failing to file a motion to withdraw the guilty plea when she knew or should have known that there was a factual and/or legal basis for the withdrawal of the plea. Petitioner did not seek to withdraw his guilty plea based on the issues raised herein until now because trial counsel led him to believe that there was no basis for such action and because previous appellate counsel were ineffective. Furthermore,:

> [t]he Commonwealth's position is, in essence, that appellant, who was a juvenile at the time, should have recognized, without assistance of counsel, the defect in the guilty plea colloquy and his counsel's ineffectiveness. The law does not expect so much of appellant, a layman.

Commonwealth v. Allen, 278 Pa.Super. 501, 508, 420 A.2d 653, 656 (1980). In *Commonwealth v. Wilks,* 250 Pa.Super. 182, 191, 378 A.2d 887, 891 (1977), the Court held that "to require a criminal defendant to recognize the ineptitude of his lawyer would be unreasonable."

In *Persinger,* the Pennsylvania Supreme Court held that defense counsel was ineffective for failing to file a motion to withdraw pleas of guilty when the defendant

was never advised of the possibility of consecutive sentences. In that case the Supreme Court reasoned that the defendant's claim was of arguable merit because the defect in the plea colloquy rendered the plea unknowing and involuntary, rising to the level of a manifest injustice for the reasons previously discussed. Therefore, a basis existed for the withdrawal of the plea. Having found that the defendant's claim was of arguable merit, the Supreme Court concluded that he was prejudiced by counsel's failure to file a motion to withdraw the plea. *Commonwealth v. Persinger,* supra. The Supreme Court then concluded, without the benefit of an evidentiary hearing, that there could have been no reasonable basis designed to advance the defendant's interests for counsel's failure to file a meritorious motion on the defendant's behalf. Similarly, in the instant case, the failure to file a motion to withdraw the plea was not designed to advance Petitioner's interests and therefore prejudiced him.

In the instant case, neither counsel nor the trial court explained to Petitioner, nor did either seek to ascertain if he understood, that a consequence of his guilty plea could or would be a *mandatory minimum* sentence of life imprisonment without the possibility of parole. Petitioner had no prior experience with the criminal justice system. Moreover, counsel failed to object to the court's defective colloquy which denied Petitioner due process of law. Furthermore, counsel failed to raise this meritorious issue on appeal.

There could be no reason for counsel's failure to inform Petitioner that a special circumstance of his plea would preclude his release from incarceration for the remainder of his life. Moreover, guilty plea counsel's gross *misinformation* to Petitioner and his family, that he would

be eligible for parole sometime after serving ten to fifteen years, deprived Petitioner of his constitutional right to effective assistance of counsel.

Here, as in the *Persinger* case, failure of the court to abide by Standard 14-1.4, 2nd Edition, ABA Standards For Criminal Justice, resulted in Petitioner "suffering manifest injustice." Because such manifest injustice provided "adequate grounds for withdrawal of [Petitioner's] plea, counsel's failure to seek withdrawal of [such] plea was prejudicial to [Petitioner] . . . There was no reasonable basis for counsel's failure to to explain the consequences of the plea and, therefore, counsel was ineffective." *Commonwealth v. Persinger,* 532 Pa. at 323-24.

As set out previously, a PCHA petition and subsequent appeal to the Superior Court were filed by Attorney Rudenstein. In that appeal, counsel challenged only the defects in the colloquy pertaining to Petitioner's lack of understanding of the consequences of the plea. Even with that counsel was ineffective for this reason: Petitioner asked Attorney Rudenstein, prior to the conclusion of the PCHA evidentiary hearing, to call trial counsel Dunworth to the stand and ask her why she misinformed Petitioner and his family that he would be eligible for parole sometime after serving ten to fifteen years and why she failed to tell him that he would never be eligible for parole, but counsel failed to call her and establish for the record her ineffectiveness. As a result, the issues raised in the the instant appeal were never presented to the court for review. Pace himself did not knowingly and intelligently fail to raise these issues in any prior proceedings. Moreover, he has demonstrated the existence of extraordinary circumstances to justify his failure to raise these issues

before now. Petitioner Pace never gave Attorney Rudenstein permission to waive these issues, nor did Attorney Rudenstein inform him that if this and other issues were not raised in that PCHA Petition, these issues would be waived. Because the issues in this motion have merit, Attorney Rudenstein was constitutionally ineffective for failing to pursue these issues on appeal and for failing to raise Attorney Dunworth's ineffectiveness for failing to raise these issues.

In conclusion, Attorney Rudenstein was constitutionally ineffective for failing to raise prior counsel's ineffectiveness for failing to raise the issues herein, and for failing himself to raise the issues raised herein. Thus, resulting in a miscarriage of justice.

Based on the issues raised above, Petitioner is entitled to post conviction collateral relief under 42 Pa.C.S.A. Section 9543(a)(2)(v). This section provids for PCRA relief when a conviction has resulted from "[a] violation of the provisions of the Constitution, law or treaties of the United States which would require the granting of Federal habeas corpus relief to a state prisoner."

In the present case, Petitioner was deprived of his right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when he entered his guilty plea unknowingly, unintelligently, and involuntarily because of the defects in the colloquy, because of the illegal sentence of life imprisonment without a stated minimum sentence for parole eligibility, and because of the deficient performance of his trial and appellant counsel. Because this claim implicates Pace's rights secured by the United States Constitution, he

would be entitled to federal habeas corpus relief if there is no state procedural bar to such relief.

As discussed previously, there is a potential waiver of the issues raised herein because they were not raised previously by trial or appellant counsel. However, the federal courts will excuse a state procedural default based upon a showing of cause and prejudice. *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977). Here the ineffective assistance of Petitioner's prior attorneys constitutes cause to excuse the procedural default because Petitioner had a constitutional right to counsel at the stages in the proceeding where counsel's ineffectiveness resulted in alleged waiver. *Commonwealth v. Eaddy,* 419 Pa.Super. 48, 56; 614 A.2d at 1203. Petitioner was prejudiced by this ineffective assistance for the reasons previously discussed. A convicted person has a right to an appeal and has the right to effective representation of counsel for purposed of the appeal. There is no effective representation when counsel through inadvertence or otherwise fails to raise an arguably meritorious issue on appeal. *Commonwealth v. Pfaff,* 477 Pa. 461, 384 A.2d 1179 (1978).

> This crucial right to direct review of all criminal convictions, guaranteed under the Pennsylvania Constitution, should not be lost due to the incompetent advice of prior counsel that no meritorious issues exist.

Eaddy, supra, 614 A.2d 1208.

When the failure to preseve an issue on direct appeal is the product of ineffective assistance of counsel, such failure does not result in a waiver of the issue for the

purposed of post conviction collateral relief. *Commonwealth v. McNeil,* 497 Pa. 187, 439 A.2d 664 (1982): *Commonwealth v. Felder,* 246 Pa.Super. 324, 370 A.2d 1214 (1976). In *Commonwealth v. Bable,* 248 Pa.Super. 496, 375 A.2d 350 (1977), the Superior Court concluded that counsel's ineffective assistance in failing to challenge the validity of a plea on on direct appeal, when there was a legal basis for such a challenge, constituted an extraordinary circumstance entitling the Petitioner to withdraw his plea pursuant to the PCHA proceeding. Moreover, when each of petitioner's PCRA previous attorneys is alleged to have rendered ineffective assistance of counsel, which if alleged would have preserved the issue for review, the issue of ineffective assistance of counsel is itself properly preserved for review. *Commonwealth v. Bradley,* 332 Pa.Super. 99, 480 A.2d 1205 (1984); *Commonwealth v. Nelson,* 393 Pa.Super. 611, 574 A.2d 1107, 1109 (1990); *Commonwealth v. Perlman,* 392 Pa.Super. 1, 572 A.2d 2 (1990).

Petitioner's claims, then, are cognizable under the PCRA even if they do not implicate the truth determining process. *Id.,* 614 A.2d at 1208.

CONCLUSION

For the foregoing reasons and arguments, this Petitioner respectfully requests that a new trial be granted or a withdrawal of his guilty plea with the opportunity to plea anew.

Respectfull submitted by:

/s/ John A. Pace
JOHN A. PACE, Pro se, appellant
P.O. Box 244
Graterford, Pennsylvania 19426-0244

EXHIBIT A

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA
v.	:	Criminal Division
JOHN ALLEN PACE, Defendant	:	Docket No.: 1272-1275 October Term, 1985

AFFIDAVIT

Commonwealth of Pennsylvania :
: ss
County of Philadelphia :

I, DOROTHY CLEMMONS, hereby certify that:

1. I am the biological mother of John Allen Pace, and I reside at 6125 Yocum Street, Philadelphia, Pennsylvania, 19143.

2. Between October and February of 1985-86, I met with my son's attorney, Ms. Moira Dunworth, Esquire, 1422 Chestnut Street, Suite 709, Philadelphia, Pennsylvania, to discuss my son's criminal case in the above captioned matter.

3. Because my son was a juvenile at the time, Attorney Dunworth was consulting with me to determine what was best for my son. It was during one of these meetings that Attorney Dunworth advised me that she wanted my son to plead guilty to second degree murder and asked me to talk to my son and convince him that this was the best route for him to take.

4. Attorney Dunworth also informed me that if my son pleaded guilty to second degree murder, he would be out of prison in ten years.

5. Because I believed Attorney Dunworth's statement that my son would get released after ten years if he pleaded guilty to the second degree murder charge, I advised my son to enter the guilty plea which he subsequently did.

/s/ Dorothy Clemmons
Dorothy Clemmons

I, DOROTHY CLEMMONS, do hereby verify that the facts set forth in the above Affidavit are true and correct to the best of my knowledge, information and belief. I realize that any false statements contained in this Affidavit are made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.s. §4904), relating to unsworn falsification to authorities.

11/6/96
Date

/s/ Dorothy Clemmons
Dorothy Clemmons

EXHIBIT B

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA
v.	:	Criminal Division
JOHN ALLEN PACE, Defendant	:	Docket No.: 1272-1275 October Term, 1985

AFFIDAVIT

Commonwealth of Pennsylvania :
: ss
County of Philadelphia :

I, MORRIS CLEMMONS, hereby certify that:

1. I am the biological father of John Allen Pace, and I reside at 1537 N. 54 Street, Philadelphia, Pennsylvania, 19131.

2. Between October and February of 1985-86, I met with my son's attorney, Ms. Moira Dunworth, Esquire, 1422 Chestnut Street, Suite 709, Philadelphia, Pennsylvania, to discuss my son's criminal case in the above captioned matter.

3. Because my son was a juvenile at the time, Attorney Dunworth was consulting with me to determine what was best for my son. It was during one of these meetings that Attorney Dunworth advised me that she wanted my son to plead guilty to second degree murder and asked me to talk to my son and convince him that this was the best route for him to take.

4. Attorney Dunworth also informed me that if my son pleaded guilty to second degree murder, he would be out of prison in ten years.

5. Because I believed Attorney Dunworth's statement that my son would get released after ten years if he pleaded guilty to the second degree murder charge, I advised my son to enter the guilty plea which he subsequently did.

I, MORRIS CLEMMONS, do hereby verify that the facts set forth in the above Affidavit are true and correct to the best of my knowledge, information and belief. I realize that any false statements contained in this Affidavit are made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.s. §4904), relating to unsworn falsification to authorities.

11/6/96
Date

/s/ Morris Clemmons
Morris Clemmons

EXHIBIT C

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA
v.	:	Criminal Division
JOHN ALLEN PACE, Defendant	:	Docket No.: 1272-1275 October Term, 1985

AFFIDAVIT

Commonwealth of Pennsylvania :
: ss
County of Philadelphia :

I, HUGH PACE, hereby certify that:

1. I am the biological brother of John Allen Pace, and I reside at 5915 Baynton Street, Philadelphia, PA 19144.

2. Between October and February of 1985-86, I, along with my parents, met with my brother's attorney, Ms. Moira Dunworth, Esquire, 1422 Chestnut Street,

Suite 709, Philadelphia, Pennsylvania, to discuss my brother's criminal case in the above captioned matter.

3. Because my brother was a juvenile at the time, Attorney Dunworth was consulting with my parents and me to determine what was best for my brother. It was during one of these meetings that Attorney Dunworth advised me that my brother should plead guilty to second degree murder. Attorney Dunworth asked us to talk to my brother and convince him that this was the best route for him to take.

4. Attorney Dunworth also informed me that if my brother pleaded guilty to second degree murder, he would be out of prison after ten years.

5 Because my parents and I believed Attorney Dunworth's statement that my brother would be eligible for parole sometime after serving ten years if he pleaded guilty to the second degree murder charge, I, along with my parents, advised my brother to enter the guilty plea which he subsequently did do.

11/5/96
Date

/s/ Hugh D. Pace
Hugh Pace

I, HUGH PACE, do hereby verify that the facts set forth in the above Affidavit are true and correct to the best of my knowledge, information and belief. I realize that any false statements contained in this Affidavit are made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.S. §4904), relating to unsworn falsification to authorities.

11/5/96
Date

/s/ Hugh D. Pace
Hugh Pace

EXHIBIT D

David S. Rudenstein
Attorney At Law

[Address Omitted In Printing]

May 21, 1990

PLEASE RESPOND TO:

Mr. John Pace
AY-6445
Box 200
Camp Hill, PA 17001-0200

RE: Commonwealth vs. Pace

Dear Mr. Pace:

Please be advised that I am in receipt of your letter, dated May 5, 1990. I have reviewed the issues raised there in and I do think that I have raised these issues with the P.C.R.A. Court, but, at the same time, I just hope that I have not misunderstood anything in your letter. Basically, the main issue that I have raised with the P.C.R.A. Court was that your plea was not voluntary or knowing because it was never explained to you that Life in Pennsylvania meant Life without parole.

There were also other issues that I would have liked to have placed on the record via an evidentiary hearing, to wit, your prior counsel admitted to me on the telephone that she did not explain Life was Life without parole simply because she had a very difficult emotional time dealing with such a prospect for you and your family. However, because Judge McCrudden denied me an evidenciary hearing, this is not of record.

I am sure the Judge will be denying our petition, thereafter, I will file notice of appeal to Superior Court raising the issues I have raised in the P.C.R.A. petition and will of course, also ask for an evidenciary hearing.

Thank you.

Very truly yours,

/s/ David Rudenstein
David Rudenstein

DSR/mer

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	NOVEMBER TERM, 1985
	:	NO. 1272,1/1
v.	:	
	:	
JOHN PACE	:	SUPERIOR COURT NO.

OPINION

SAVITT, J. JULY 29, 1997

PROCEDURAL HISTORY

Petitioner John Pace pled guilty to second degree murder and possession of an instrument of a crime for the beating death and robbery of Randolph Baldwin on September 18, 1985. A thorough and complete guilty plea colloquy was conducted by this court on February 13, 1986. Neither a motion to withdraw the guilty plea nor a direct appeal was ever filed.

On August 21, 1986 petitioner filed a *pro se* PCRA petition, counsel was appointed and filed an amended petition on March 31, 1987. On July 25, 1988 the Commonwealth's Motion to Dismiss, which had been filed on June 3, 1987, was denied and a evidentiary hearing was held on November 15, 1988. On June 16, 1989 counsel was permitted to withdraw and new counsel was appointed and filed a supplemental amended petition. Another evidentiary hearing was held on March 26, 1991 and on July 23, 1991 the court granted the Commonwealth's second motion to dismiss, which had been filed on March 29, 1990. On March 30,1992 Superior Court affirmed the lower court and petitioner filed a petition for allowance of appeal which was denied by the Pennsylvania Supreme Court on September 2,1992.

The second and instant petition was filed on March 24,1997, counsel was appointed and filed a Finley letter on June 17, 1997. Petitioner was timely notified and, on July 23,1997, the petition was dismissed. This appeal followed.

The sole issue raised by petitioner here, that his guilty plea was not knowing and voluntary, was raised in petitioner's first PCRA petition. A petitioner is not entitled to PCRA review on an issue which has been previously litigated. An issue has been previously litigated if the highest appellate court in which petitioner could have review as a matter of right has ruled on the merits of the issue. 42 Pa.C.S.A. §9544(a)(2) or has been raised and decided in a proceeding collaterally attacking the conviction or sentence. 42 Pa.C.S.A. §9544(a)(3). Here the identical issue was not only raised and decided in a collateral proceeding but also reviewed by the Superior Court and decided against petitioner. Clearly, he is not entitled to a new trial on this basis.

Further, a review of the record of both the guilty plea colloquy and the collateral proceeding reveals that there are no issues of arguable merit. Petitioner's guilty plea colloquy was thorough and complete, petitioner answered every question indicating that he understood and there is no showing on the record of the previous collateral proceedings that petitioner was misled by trial counsel. Accordingly, petitioner is not entitled to relief on this basis.

For the reasons set forth herein the instant PCRA petition was denied.

/s/ Savitt
J.

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRIST

COMMONWEALTH OF PENNSYLVANIA,	:	Superior Court Docket No. 03642PHL97
Appelle	:	
vs.	:	
JOHN A. PACE,	:	Trial Court Docket Nos. OCTOBER TERM, 1985
Appellant	:	No. 1272, 1/1

PROOF OF SERVICE

I hereby certify that I am this day of April serving the foregoing document(s) upon the person(s) and in the manner indicated below:

Service by First Class Mail addressed as follows:

District Attorney of Philadelphia (215) 686-5729
Appeals Unit
1421 Arch Street
Philadelphia, PA 19102

Attention: Peter j. Gardner, Assistant D.A.

/s/ John A. Pace
John A. Pace, AY-6445
P.O. Box 244
Graterford, PA 19426-0244

(6)

No. 03-9627

In The Supreme Court of the United States

JOHN A. PACE,

Petitioner,

v.

DAVID DiGUGLIELMO, Superintendent,
State Correctional Institution at Graterford,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX
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Petition For Certiorari Filed March 4, 2004
Certiorari Granted September 28, 2004

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[SEAL]

DISTRICT ATTORNEY'S OFFICE
1421 ARCH STREET
PHILADELPHIA, PENNSYLVANIA 19102
686-8000

LYNNE ABRAHAM
DISTRICT ATTORNEY

May 6, 1998

David A. Szewczak, Esquire
Prothonotary
Superior Court of Pennsylvania
530 Walnut Street, Suite 315
Philadelphia, Pennsylvania 19106

Re: LETTER BRIEF
Commonwealth v. John Pace
No. 3642 Philadelphia 1997

Dear Mr. Szewczak:

On February 13, 1986, defendant pled guilty to second degree murder and possessing an instrument of crime (Nos. 1272, 1275, October Term, 1985) before the Honorable David N. Savitt. Judge Savitt sentenced defendant to life imprisonment for the murder and a concurrent term of one to two years for possessing an instrument of crime. Content with his guilty plea, defendant did not move to withdraw the plea, modify the sentence, or appeal.

On August 21, 1986, however, defendant had a change of heart and filed a *pro se* petition for relief under the Post Conviction Hearing Act (PCHA). With the aid of appointed counsel, defendant filed an amended petition. Following a hearing on the Commonwealth's motion to dismiss but before a decision was rendered, counsel withdrew and new counsel was appointed to represent defendant. A second amended PCHA petition was filed, alleging trial counsel's

ineffectiveness. On July 23, 1991, the post-conviction court, the Honorable James D. McCrudden, dismissed defendant's petition.

Defendant appealed to this Court, which affirmed the denial of post-conviction relief on March 30, 1992. *See Commonwealth v. John Pace,* No. 2429 Philadelphia 1991 (Pa.Super. filed March 30, 1992). Defendant then filed a petition for allowance of appeal, which was denied by the Pennsylvania Supreme Court on September 2, 1992.

On November 27, 1996, over ten years after his judgment of sentence became final, defendant filed his second petition for state post-conviction relief, under the Post Conviction Relief Act (PCRA). Judge Savitt dismissed the petition on July 23, 1997. This *pro se* appeal followed. No relief is due.

BECAUSE DEFENDANT'S SERIAL PCRA PETITION WAS UNTIMELY, THE COURT BELOW LACKED JURISDICTION TO ENTERTAIN IT, AND, AS A RESULT, NO CLAIM EXISTS FOR THIS COURT TO REVIEW.

Defendant's second petition was indisputably untimely. In *Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa.Super. 1997), this Court noted that in 1995, the General Assembly modified the PCRA to, *inter alia*, specify time limits for the litigation of PCRA petitions. The 1995 PCRA amendments required that, in all cases except those fitting narrowly tailored exceptions, a PCRA petition must be filed within one year of the date that the defendant's judgment became final. Specifically, the amendments, applicable to petitions filed after January 16, 1996, bar any petition for post-conviction relief, "*including* a *second or subsequent petition*," not filed "within one year of the

date the judgment becomes final." 42 Pa.C.S.A. §9545(b)(1) (emphasis added).[1] "[A] judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S.A. §9545(b)(3). This provision assures the prompt resolution of collateral claims before files and crucial documents are lost, before memories have dispersed, and, where meritorious claims are presented, before a lengthy period of improper incarceration has passed.

Here, defendant did not appeal his judgments of sentence. Therefore, defendant's judgment became final on March 13, 1986, thirty days after sentencing. The instant collateral petition, defendant's second, was not filed until November 27, 1996, over ten years after his conviction became final. The petition, thus, was time-barred.

Section 9545 clearly and unambiguously demonstrates that defendant's second post-conviction petition is time-barred and, thus, the lower court lacked jurisdiction even to entertain it. *See Commonwealth v. Alcorn, supra.* When the language of a statute is clear and unambiguous, it must be given effect in accordance with its plain and obvious meaning. *E.g., Commonwealth v. Corporan,* 531 Pa. 348, 351, 613 A.2d 530, 531 (1992).

---

[1] The Pennsylvania Supreme Court's recent grant of an additional one year grace period in which to file a *first* PCRA under the 1995 amendments, *see* Pa.R.Crim.P. 1501 (Comment), is not applicable to the instant matter. As defendant is currently appealing the dismissal of his *second* post-conviction petition, he is not entitled to the benefit of this grace period. *See Alcorn, supra,* 703 A.2d at 1057.

Although the 1995 PCRA amendments provided exceptions to the one year deadline for filing a PCRA petition, defendant's petition alleged nothing that would trigger any of them. These exceptions excuse a petitioner's failure to file a PCRA petition within a year of the date his judgment becomes final if the petitioner proves that (1) "the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;" or (2) "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence;" or (3) "the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively." *See* 42 Pa.C.S.A. §9545(b)(1)(i)-(iii).

Defendant's PCRA petition did not claim that *any* of these exceptions applied. And, indeed, a review of the petition, and defendant's appellate brief, conclusively establishes that no exception applies. Defendant raises three complaints in his appellate brief, alleging that his sentence of life imprisonment for second degree murder – which was *mandated* by statute – somehow is invalid unless a minimum term allowing for parole eligibility is written into it. Defendant further complains that the guilty plea colloquy failed to ensure that he understood the consequences of his plea. (It should be noted that this complaint was raised, and rejected by this Court, in defendant's 1991 appeal. *See Commonwealth v. John Pace,* No. 2429 Philadelphia 1991 (Pa.Super. filed March 30, 1992).) Defendant's final complaint is a blanket accusation

of ineffectiveness against all prior counsel. These types of complaints do not present the extraordinary circumstances contemplated by the §9545 exceptions. The basis for these complaints – if any – have all existed ever since defendant's trial. Government officials did not prevent defendant from raising his claims in a timely manner; the instant petition is not based on facts that were unknown and unavailable to defendant; and defendant has not asserted a new constitutional right that either the Pennsylvania Supreme Court or the United States Supreme Court has held apply retroactively. Accordingly, defendant's PCRA petition was and is time-barred. And, since it is time-barred, the lower court had no power to grant relief, and he can raise no cognizable complaint on appeal.

As this Court specifically recognized in *Alcorn, supra,* section 9545's time restrictions have a jurisdictional consequence. The trial court had no jurisdiction over defendant's judgments of sentence once thirty days passed. 42 Pa.C.S.A. §5505. Thereafter, a court's jurisdiction to entertain a subsequent collateral attack depends entirely upon what the legislature authorizes. "Post conviction relief is afforded petitioners in Pennsylvania through the grace of the legislature." *Alcorn, supra*, 703 A.2d at 1057. Here, the legislature has conferred post-conviction jurisdiction upon the courts, but constrained that jurisdiction by both time requirements and substantive requirements. And, unless the petitioner files a timely petition, or he pleads and proves at least one of the three exceptions, the court has no authority to entertain the petition. *Id.* Because the PCRA court had no jurisdiction to grant defendant relief, there is no claim for this Court to review. *Id.*

This Court and the Commonwealth should not have to review the record here and respond to claims which are

not available to defendant under the Act he invokes. *Id.* at 1056 ("We need not address any of appellant's issues because the PCRA court lacked jurisdiction to hear appellant's PCRA petition"). Defendant, who already has had his conviction reviewed, is not entitled to endless levels of additional review. The General Assembly has modified the PCRA so that individuals, like defendant, may no longer burden the court system with an endless influx of repetitive petitions. To even reach the "merits" of defendant's petition would constitute a clear defiance of the legislature's intent and allow defendant a privilege which this Court has explicitly recognized he has no entitlement to. *Id.* at 1057.[2]

Accordingly, defendant's appeal from the denial of his time-barred PCRA petition should be quashed. At a minimum, the order denying defendant's petition must be affirmed.

Respectfully submitted,

/s/ Michael A. Morse
MICHAEL A. MORSE
Assistant District Attorney

/s/ Peter J. Gardner
PETER J. GARDNER
Assistant Chief, Appeals Unit

cc: Honorable David N. Savitt
John A. Pace, *pro se*

[2] Should this panel chose to reach the "merits" of defendant's arguments, notwithstanding *Alcorn* and the PCRA, the Commonwealth respectfully requests the opportunity to address the merits of defendant's claims.

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appelle

vs.

JOHN A. PACE
Appellant

Philadelphia 1997
No. 03642

APPELLANT'S REPLY BRIEF

(Filed May 28, 1998)

Appeal from the Order of The Honorable David N. Savitt filed July 23, 1997, in the Court of Common Pleas, Criminal Trial Division which denied appellant's Post Conviction Relief Petition.

John A. Pace, AY-6445
P.O. Box 244
Graterford, Pennsylvania

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STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Court pursuant to *Pa.R.A.P. 2113 and 2185(a).*

APPELLANT IS ENTITLED TO POST CONVICTION RELIEF, DESPITE THE COMMONWEALTH'S OBJECTION TO THE CONTRARY, AND THIS COURT SHOULD ENTERTAIN THIS PETITION, AS CLAIMS FOR RELIEF DO EXIST.

On August 21, 1996, appellant filed a his first *Post Conviction Hearing Act* Petition challenging the voluntariness of his guilty plea, which occurred on February 13, 1996, six months prior. The disposition of this appeal ended with a denial of an allowance of appeal by the Pennsylvania Supreme Court on September 2, 1992, which was *over six years* after this petition was filed. On November 27, 1996, appellant filed his second Post Conviction Relief Act Petition (PCRA), which was four years after the Pennsylvania Supreme Court denied his first *PCHA* petition for an allowance of appeal. It is clear that this appellant has not abused the *PCRA* process. The appellant filed this second *PCRA* petition out of necessity, and in hopes of receiving some measure of justice. Appellant raised three issues in this *PCRA* petition to be reviewed.

"Terms of life imprisonment imposed without a discretionary minimum term for parole eligibility for crimes except first and second degree arson – murder are *illegal;*" "Guilty plea *colloquy that failed to ensure that Petitioner understood the consequences of his plea,* compels a withdrawal of his plea," and "Ineffective assistance at all levels of representation, resulted in a denial of due process and a miscarriage of justice." It was this Court that held that a conviction cannot stand upon a constitutional error that affected the verdict. *See: Commonwealth v. Stark,* 442 Pa. Super. 127, 658 A.2d 816 (1995) (Post Conviction review by an appellate court is limited to determining whether a trial court's findings are supported by the record and whether its order is otherwise free of legal error).

Nevertheless, the Commonwealth argues that appellant is not entitled to any relief, and does not have access to this Court because of the recent decision in *Commonwealth v. Alcorn,* 703 A.2d 1054 (Pa.Super.1997). In *Alcorn,* this Court noted that in 1995, the General Assembly made modifications to the PCRA to indicate time limits for the litigation of PCRA petitions. More specifically, the amendments bars any petition for post-conviction relief, including a second or subsequent petition, not filed within one year of the date the defendant's judgment of sentence became final. The only exception being those cases that can meet the enumerated requirements, and a PCRA petition that is filed within one year of the date that the defendant's judgment is final. 42 Pa.C.S.A. §9545(b)(1)(i)(ii)(iii). Therefore, because appellant judgment of sentence was final March 13, 1986, thirty days after his guilty plea and sentencing and over ten years now, the Commonwealth asks that his PCRA petition be quashed.

When appellant filed this second PCRA petition on November 27, 1996, *Alcorn* was not the law, because this Court had not decided on that case yet. But, *Commonwealth v. Blackwell,* 384 Pa. Super. 251, 558 A.2d 107 (1989), and *Commonwealth v. Lawson,* 519 Pa. 504, 549 A.2d 107 (1988) was the law, and is still the law. *Blackwell/Lawson* are judicial exceptions to the waiver doctrine of the old PCRA legislation, and certainly should be retained as a judicial exception under the new PCRA legislation. The *Blackwell/Lawson* standards of review for second and subsequent PCRA petitions serves as a valuable relief mechanism and safeguard to check situations such as the present, and these decisions have not been overruled by either the Pennsylvania Supreme Court or this Court. As well, *Alcorn,* supra. has not overruled these decisions, nor is it retroactive. So the Commonwealth's reliance on this decision is misplaced. It may be assumed that these decisions are no longer valid because they have been overruled by the legislature's enactment of the new PCRA legislation. But if this is true, it creates problems on its own; such as, a violation of separation of powers encroachment on the judiciary and things of this sort. So even though the legislature did not expressly state that *Blackwell/Lawson* was overruled, they made certain that, that would be the result by stating in the text of the statute, "Any petition, including a second or subsequent petition, shall be filed within one year of the date the judgement becomes final." This "back-door" encroaching should be recognized by this Court and should be checked. The legislature is not permitted to overrule judicial decisions theoretically, expressly or otherwise, because that is the role of judiciary. Appellant urges this Court to exercise its judicial wisdom in upholding *Blachwell/Lawson,* supra. standards of review for second and subsequent

PCRA petitions as a *Judicial exception* to the time bar. Appellant believes that the issues presented in the instant case, demonstrates a miscarriage of justice that entitles him to PCRA review. Appellant ask that this Court review his PCRA petition under the *Blackwell/lawson* standard and remand his case back to the lower courts for further review; or in the alternative, order a new trial based on the allegations raised herein. It is clear that the honorable Thomas Saylor of this Court felt that *Blackwell* and *Lawson* would still be applicable to future PCRA petitions under the 1995 amendments when he stated: ***Subsequent Petitions***

> Subsequent and successive petitions are subject to the same deadlines applicable to an initial petition. § 9545(b)(1). In addition, such petitions will not be reviewed unless the petitioner makes a strong prima facie showing that a miscarriage of justice may have occurred (Commonwealth v. Lawson, 519 Pa. 504, 549 A.2d 107 (1988). *See:* (Pennsylvania Law Weekly) Monday, June 30, 1997. ***Post Conviction Relief in Pennsylvania.***

If this position taken by the Commonwealth is upheld, it would demonstrate a clear breakdown of the adversarial process, as well as a miscarriage of justice. Despite the existence of constitutional errors that remain unresolved in the instant case; errors that no question contributed to the verdict in such a way, that it undermined the truth – determining process that no reliable adjudication of innocence or guilt has taken place, the Commonwealth urges this Court to disregard all of that and quash appellant's appeal.

Again, the Commonwealth relies on the retroactive application of the amendments to the PCRA by the General Assembly 42 Pa. C.S.A. §9545(b)(1) which states:

> "(b) Time for filing petition.
>
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgement becomes final, unless the petition alleges and the petitioner proves that:

Based on this section and the opinion rendered in *Commonwealth v. Alcorn,* supra., the Commonwealth's contention is that appellant is time barred from filing his second PCRA petition, and this Court does not have jurisdiction to entertain this appeal. This new amendment to the PCRA process is a servere instance of retroactivity that deprives appellant of Procedural and Substantive Due Process, as well as access to the Courts under the 14th. Amendment to the United States Constitution. Appellant's second PCRA petition was filed in November 1996, over ten years after the final judgment was rendered in his case. Appellant challenges the PCRA's one year statute of limitation to petitions arising from judgment that became final *prior to the effective date of the PCRA.* Prior to the passage of the new PCRA legislation, a petitioner had the right to file a petition at any time after a conviction became final. The Pennsyvania Superior Court and the Pennsylvania Supreme Court has held in previous decisions that the delay in filing a PCRA petition, standing alone, was not a sufficient reason to deny the petition, but that the delay may be considered as a factor in assessing the petition's merit. *Commonwealth v. Johnson,* 516 Pa. 407, 532 A.2d 796 (1987); *Commonwealth v. McCabe,* 359

Pa. Super. 566, 519 A.2d 497 (1986). The Pennsylvania General Assembly has decided to take on the role of Judiciary and decide that, delay by itself, can result in the dismissal of an individual's PCRA petition. §9545(b)(1), supra. Thus, an individual whose conviction becomes final on or after January 16, 1996 have one year in which to file a PCRA petition unless he/she meets one of the other enumerated exceptions which follows:

> "(i) The failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in vioaltion of the Constitution or laws of this Commonwealth or the Constitution or laws of the Uni'ed States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a Constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that Court to apply retroactively.
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days from the date the claim could have been presented."

Id. §9545(b)(1)(i)(ii)(iii)(2). Applying the new time limitation retroactively to the instant case would mean that on the effective date of the PCRA, which was January 16, 1996, without prior notice or opportunity to act, the

legislature stripped appellant's rights and fair expectations as of February 13, 1986. This is completely unfair. The rights appellant had, that is, to file a PCRA petition at anytime after his conviction, was vested rights, and clearly, legislation such as the one at issue, cannot retroactively bar a petitioner from his/her ability to have a court consider the propriety of a PCRA petition without first having a reasonable time to bring the claim. The problem with the instant PCRA legislation is that, it does not give anyone fair notice. Fair notice certainly implicates due process concerns, and because of a lack of fair notice, it will deprive appellant and others who are similarly situated, due process of law, as well as access to courts. In *Miller v. Florida,* 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed. 2d. 351 (1987), the United States Supreme Court stated that a law is retrospective if it changes the legal consequences of acts completed before its effective date and that such a law was violative of due process. In the instant case, the new PCRA legislation clearly attaches new legal consequences to events that were already completed before its enactment. Since final judgment was rendered in appellant's case on March 13, 1986, an event already completed, the new legal consequences is that appellant is now time barred from filing *any* PCRA petition. In this sense, ex post facto violations could be implicated. Applying the PCRA retroactively to strip completely the right of prisoners, such as appellant, to petition for PCRA relief, would be entirely unfair and a severe instance of retroactivity. The U.S. Supreme Court has held that new legislation shortening a statute of limitations must also allow pre-existing claimants a reasonable time in which to file their claims:

> "[I]t may be properly conceded that all statutes of limitation must proceed on the idea that the

party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; *if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily,* whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action . . ."

Texaco v. Short, 454 U.S. 516, 527 n.21, 102 S.Ct. 781, 791, n21 (1982), (Quoting *Wilson v. Iseminger,* 185 U.S. 55, 22 S.Ct. 573 (1902). The Due Process Clause, is the forerunner in protecting the interest in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause may not suffice to warrant retroactive application. The Due Process Clause has the ability to check the legislature's unmatched powers that allow it to sweep away settled expectations suddenly and without individualized consideration.

So again, the Commonwealth reliance on *Commonwealth v. Alcorn,* supra. is misplaced. The Commonwealth argues that appellant has not established any claim that is recognizable by the limited exceptions to the time bar. Appellant believe and avers that he is also entitled to relief under §9545(b)(1)(ii) supra. Appellant who was seventeen years old when he entered his guilty plea on March 13, 1986 and has no prior experience with the judiciary system, was an unskilled layman, completely ignorant of the law. Immediately once he learned that the information provided to him by trial counsel was false, he filed a PCHA petition on August 21, 1986. Furthermore,

appellant believes that the issue at bar, concerns a question of waiver, not a question of jurisdiction as the Commonwealth argues. Since appellant could not, and still cannot allege PCRA counsel(s) ineffectiveness for their combined failure to provide adequate assistance on the prior collateral matter; their actions went unchecked, and could have only been challenged by appellant filing subsequent PCRA petition. *See: Commonwealth v. Beasley,* 678 A.2d 773 (1996). The Pennsylvania Supreme Court held in *Commonwealth v. Christy,* 540 Pa. 192, 656 A2d. 877 (1995), that an allegation that prior counsel was ineffective for failing to raise an issue *will* overcome the waiver provision of the PCRA *as long as appellant had a constitutional right to counsel at the stage in the proceedings where counsel's ineffective resulted the waiver.* All the issues that appellant is raising are trial related. Appellant challenges the illegality of his sentence, which is an issue never waived. Appellant challenges the guilty plea colloquy that is defective, because it fails to inform the appellant that he would be ineligible for parole by pleading guilty. This issue has never been raised and the record will reflect it. Lastly, appellant raises the issue of ineffective assistance of all counsels. This is not a blanket accusation of ineffectiveness against all prior counsels. Appellant support is PCRA counsel Rudenstein's letter (see exhibit D), where trial counsel omits to him that she did not inform appellant of the consequences of his plea. So clearly PCRA counsel should have subpoena her to testify on March 26, 1991, to explain exactly what she did tell appellant. He had enough evidences to support appellant's claim, and the record does not refute appellant's contention that he was told that he would be released after serving 10 to 15 years and that it's not the end of his life. PCRA inaction in this regard must be checked. Recently the Third Circuit Court appeal ruled

in *Meyers v. Gillis,* (Phila. Daily News April 28, 1998), that erroneous advice by trial counsel to the defendant that he will be eligible for parole to second degree murder does entitle defendant to receive a new trial.

WHEREFORE, for all the foregoing reasons, appellant respectfully request that this Honorable Court to reverse the PCRA Court's order and either Order a new trial or remand for further proceeding so that appellant can fully have these issues litigated.

Dated: March 26, 1998

Respectfully,

/s/ John A. Pace
John A. Pace, AY6645
P.O. Box 244
Graterford, PA 19426

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	Philadelphia 1997
Appelle	:	No. 03642
vs.	:	
JOHN A. PACE,	:	Trial Court Docket Nos.
Appellant	:	OCTOBER TERM, 1985
	:	No. 1272, 1/1

PROOF OF SERVICE

I hereby that I am this 26th day of May serving the forgoing document(s) upon the person(s) and in the manner indicated below:

Service by First Class Mail Addressed as follow:

Peter J. Gardner
District Attorney Office
1421 Arch Street
Philadelphia, PA 19102
(215) 686-5729

/s/ John A. Pace
John A. Pace, AY-6445
P.O. Box 244
Graterford, PA 19426-0244

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
JOHN A. PACE,	:	
Appellant	:	No. 3642 Philadelphia 1997

Appeal from the Order dated July 23, 1997,
in the Court of Common Pleas of Philadelphia County,
Criminal, at October Term, 1985, No. 1272 1/1.

(Filed Dec. 3, 1998)

BEFORE: DEL SOLE, HUDOCK and HESTER, JJ.

MEMORANDUM:

This is an appeal from the order denying Appellant's second petition for relief under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. sections 9541-46. We affirm.

On February 13, 1986, Appellant entered a plea of guilty to second-degree murder and possessing an instrument of crime (PIC).[1] He was sentenced to life imprisonment for the murder conviction and received a concurrent term of not less than one nor more than two years for the PIC conviction. Appellant did not file a motion to withdraw or reconsider the guilty plea, nor did he file a direct appeal.

Appellant filed his first petition for post-conviction relief on August 21, 1986, with the court appointing

[1] 18 Pa.C.S.A. §§ 2502 and 907, respectively.

counsel to represent him.[2] An amended petition was filed by counsel on March 31, 1987, alleging ineffectiveness of trial counsel. Subsequently, the Commonwealth filed a motion to dismiss, and after conducting a hearing, the PCHA court denied the Commonwealth's request. Thereafter, counsel withdrew his representation and new counsel was appointed by the court.

New counsel filed a second amended petition on November 29, 1989, alleging ineffectiveness of trial counsel and trial court error in misleading Appellant into believing that he would be eligible for parole even though he received a mandatory life sentence. On March 29, 1990, the Commonwealth filed a second motion to dismiss, which was held under advisement pending an evidentiary hearing on the petition for relief. On March 26, 1991, an evidentiary hearing was conducted and again the court held the matter under advisement. On July 23, 1991, the court granted the Commonwealth's motion and dismissed Appellant's petition for post-conviction relief. This Court subsequently affirmed the dismissal. ***Commonwealth v. Pace***, 612 A.2d 535 (Pa.Super. 1992) (unpublished memorandum). On September 2, 1992, the Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal.

Appellant filed the current post-conviction petition, his first under the PCRA and second overall, on November 27, 1996. Counsel was appointed and subsequently filed a petition to withdraw and a "no-merit" letter pursuant to ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927

[2] This first petition was filed under the Post Conviction Hearing Act (PCHA), which was superseded by the PCRA.

(1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988). On July 23, 1997, the PCRA court granted counsel's petition to withdraw and dismissed Appellant's petition based upon the "no-merit" letter. This appeal followed.

The *pro se* brief submitted by Appellant claims that the PCRA court erred in granting counsel's petition to withdraw and in denying his petition for post-conviction relief. Specifically, he argues the following: the imposition of a life sentence without eligibility for parole was illegal; his guilty plea was entered involuntarily; and, that all counsel were ineffective, resulting in a miscarriage of justice. We need not address these claims because we find that the PCRA court lacked jurisdiction to hear Appellant's petition.

Because Appellant's present PCRA petition was filed on November 27, 1996, it is governed by the most recent amendments to the PCRA which were enacted on November 17, 1995, and became effective 60 days thereafter.[3] Included in the amendments was a change in the provision governing the time in which a PCRA petition had to be filed, 42 Pa.C.S.A. section 9545(b). Section 9545(b) now states:

> **(b) Time for filing petition. -**
>
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

[3] Act of November 17, 1995, P.L. 1118, No. 32 (Spec. Sess. No. 1), § 1.

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days from the date the claim could have been presented.
>
> (3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.
>
> (4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained.

42 Pa.C.S.A. § 9545(b).

Accordingly, Appellant had to file his current petition within one year of the date his judgment of sentence became final. According to section 9545(b)(3), Appellant's judgment of sentence became final at the conclusion of direct review. Because Appellant did not file an appeal with this Court, his judgment of sentence became final at the expiration of the time period for seeking such review, thirty days after judgment of sentence, or March 14, 1986. ***See*** Pa.R.A.P. 903(a) (notice of appeals must be filed within 30 days). Therefore, Appellant's judgment of sentence became final more than ten years before he filed the current PCRA petition.

Moreover, Appellant's petition does not come within the proviso of the note following section 9545(b), which states that a petitioner whose judgment has become final on or before the effective date of the amendments shall be deemed to have filed a timely petition if his first petition is filed within one year of the effective date of the amendments. ***Commonwealth v. Alcorn***, 703 A.2d 1054, 1057 (Pa. Super. 1997), *appeal denied,* 1998 Pa. Lexis 1162 (Pa. June 8, 1998). If the present petition had been Appellant's first, it would be timely, as it was filed within one year of the effective date of the amendments; however, the current petition is Appellant's second, thus it was required to be filed within one year of the judgment of sentence becoming final. ***Id.*** Consequently, because Appellant's PCRA petition was not filed within one year of his judgment of sentence becoming final, it will be untimely unless one of the exceptions of section 9545(b)(1) applies. ***Id.***

Accordingly, we have reviewed the exceptions under section 9545(b)(1) and find that none is applicable. Appellant has neither alleged nor proven that his delay in raising his current claims was caused by interference by

governmental officials, thus section 9545(b)(1)(i) is inapplicable. ***Commonwealth v. Perry***, 716 A.2d 1259, 1261 (Pa. Super. 1998). In addition, Appellant has neither alleged nor proven that the claims that comprise his current PCRA petition were not known to him or could not be ascertained by the exercise of due diligence, therefore, section 9545(b)(1)(ii) is inapplicable. ***Id.*** Finally, Appellant has neither alleged nor proven that his claims consist of recently recognized constitutional rights, thus section 9545(b)(1)(iii) is inapplicable. ***Id.*** at 1261-1262. Since Appellant's PCRA petition does not fall into any of the exceptions, it is untimely. Therefore, the PCRA court lacked jurisdiction and its dismissal of the petition was proper.[4] ***Alcorn, supra,*** at 1057.

Order affirmed.

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[4] Although the PCRA court dismissed the petition on grounds other than untimeliness, this Court may affirm a decision if it is correct on any basis. ***Commonwealth v. Petroski***, 695 A.2d 844, 847 (Pa. Super. 1997).

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appelle

vs.

JOHN A. PACE,
Appellant

Philadelphia 1997
No. 03642

APPELLANT'S APPLICATION FOR REARGUMENT

A request for allowance for reargument from the Order of The Honorable Justices: Del Sole, Hudock, and Hester filed December 3, 1998, in the Superior of Pennsylvania, affirming the Order of The Honorable David N. Savitt filed July 23, 1997, in the Court of Common Pleas, Criminal Trail Division, which denied appellant's Post Conviction Relief Petition.

John A. Pace, AY-6445
P.O. Box 244
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STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Court pursuant to *Pa.R.A.P. 2542(A).*

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	SUPERIOR COURT DOCKET
V.	:	NO. #03642PHIL97
JOHN A. PACE,	:	
APPELLANT	:	

APPLICATION FOR REARGUMENT
PURSUANT TO Pa.R.A.P 2542(A)

TO THE HONORABLE JUSTICES OF THE PENNSYLVANIA SUPERIOR COURT:

AND NOW, COMES *JOHN A. PACE,* petitioner herein who respectfully request that this Honorable Court to entertain jurisdiction under *Pa.R.A.P. 2542(A)* et. seq., and allow reargument in the above-caption matter for the following reasons:

Petitioner received a decision from the Pennsylvania Superior Court in the form of an Order on December 4, 1998, which stated in relevant part that;

> " . . . Accordingly, we have reviewed the exceptions under sections 9545(b)(1) and find that none is applicable. Appellant has neither alleged nor proven that his delay in raising his current claims was caused by interference by government officials, thus section 9545(b)(1)(i) is inapplicabe. *Commonwealth v. Perry,* 716 A.2d 1259, 1261 (Pa. Super. 1998). . . ."

Id. at page 5. While it is true that petitioner did not previously articulate the fact that his delay in filing the current PCRA petition was the result of government interference, which would satisfy *42 Pa.C.S.A. § 9545(b)(1)(i);* nevertheless, it was in fact the reason why petitioner failed to timely file his current PCRA petition. Because petitioner believed that the amended PCRA legislation was not retroactive; specifically section § *9545(b)(1),* he did not feel compelled to immediately file his current PCRA petition, especially since he was unprepared to do so. As previously stated, petitioner believes and therefore avers that, "the failure to raise the claim previously was the

result of interference by governmental officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the constitution or laws of the United States." *See: 42 Pa.C.S.A. § 9545(b)(1)(i).* Petitioner maintains that as a result of the Camphill disturbance on October 25 and 26th of 1989, and the subsequent conduct of the prison officials deliberately destroying all inmates personal possessions, including all legal documents, impaired petitioner's ability to proceed with filing the current PCRA petition. To further support petitioner's argument; enclosed herewith, as *Exhibit A.,* is a partial letter which was written by petitioner to the Clerk of Courts, than Peter Truman, and the letter was date stamped Febuary 14, 1990. In the letter to the Clerk of Court, petitioner is clearly explaining to the clerk that all of his legal documents were destroyed after the disturbance at Camphill in 1989. This petitioner believes should be a sufficient reason to excuse his failure to timely file his current PCRA petition.

A second reason for this Court's consideration is that the Court has overlooked and misapprehended a fact of record material to the outcome of the case; specifically, petitioner alleged and averred that the sentence petition is now serving is illegal, and the Court completely over looked this fact without any consideration. Petitioner maintained in his original brief to this Court that the sentence was unconstitutional and illegal and therefore cannot be waived. *See: 42 Pa.C.S.A. § 9781(a); Commonwealth v. Campbell,* 351 Pa. Super. 56, 505 A.2d 262 (1986); *Commonwealth v. Walker,* 390 Pa. Super. 76, 568 A.2d. 201 (1990); and original *brief at 8.* Therefore, this Honorable Court should have addressed the question of illegality of the sentence.

WHEREFORE, Petitioner respectfully request that this Honorable Court allow reargument to proceed in the instant case.

Date: December 14, 1998

Respectfully Submitted,

/s/ John A. Pace

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	SUPERIOR COURT DOCKET
V.	:	NO. 03642PHIL97
JOHN A. PACE,	:	
APPELLANT	:	

PROOF OF SERVICE

I hereby certify that I am this 14th day of December serving the foregoing document(s) upon the person(s) and in the manner indicated below:

Service by First Class Mail addressed as follows:

District Attorney's Office of Philadelphia
Catherine Marshall, Appeal Unit
1421 Arch Street
Philadelphia, PA 19102
(215) 686-5729

Dated December 14, 1998 /s/ John A. Pace
John A. Pace, pro se
P.O. Box 244, AY-6445
Graterford, PA 19426-0244

cp. 8510-1272 PLHF
Docket 4/18/90
Item 728

with the name of the Beneficiary, the most
recent one

The original

FEB 14 1990

letter was sent

to

From Wm. John Lee
Box Cpx. 445
S.C. Cot...
Graterford, Pa. ...

323

Ms. Wm. Patti Lenman
Clerk of Quarter Sessions
Room 666 City Hall
Philadelphia, Pa. 1910-

Leon Clark
Room 370 City Hall

February 7, 1990

Dear Ms. Lenman

My name is John Lee, and I am presently incarcerated in the State Correctional Institution at Camphill, Pa.

The purpose I am writing you, is to inquire of some very essential information, and I pray that you can be of assistance.

Again, as I stated to you, I am in the Institution of Camphill and as you know about the disturbance that took place here in October of 1989.

Well with all of that in mind, I would like to tell you that during the aftermath of the disturbance, all of my property was destroyed and that included my legal material. So at present I am unable with out all of my legal materials to prepare my case that is presently in the post conviction

A112

Exhibit A

BEST AVAILABLE COPY

[LOGO] DISTRICT ATTORNEY'S OFFICE
1421 ARCH STREET
PHILADELPHIA, PENNSYLVANIA 19102
686-8000

LYNNE ABRAHAM
DISTRICT ATTORNEY

January 7, 1999

David A. Szewczak, Esquire
Prothonotary
Superior Court of Pennsylvania
530 Walnut Street
Third Floor, Suite 315
Philadelphia, Pa. 19106

Re: Commonwealth v. John Pace
No. 3642 Philadelphia 1997

Dear Mr. Szewczak:

This case is before the Court pursuant to defendant's Application for Reargument of the order of Superior Court, affirming the denial of post-conviction relief.

In his application, defendant attempts to skirt the time-bar by making a new allegation that government officials interfered with his ability to raise his claims earlier. Defendant may not raise an issue in his reargument application that was not raised in his Superior Court brief. Thus, this new issue is waived. Pa.R.A.P. 302(a).

The other assertions in defendant's application are adequately addressed in the panel opinion, the lower court opinion, and the Commonwealth's original brief, upon which the Commonwealth will rely to support its position that reargument is unwarranted. A copy of the Commonwealth's brief is attached for the convenience of the Court.

For the reasons set forth, the Commonwealth respectfully requests that reconsideration be denied.

Respectfully Submitted,

/s/ Catherine Marshall
CATHERINE MARSHALL
Chief, Appeals Unit

cc: John Pace, *Pro Se*

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOHN A. PACE, Appellant	:	No. 3642 Philadelphia 1997

ORDER

AND NOW, this 8th, day of February, 1999, IT IS HEREBY ORDERED:

THAT the application filed December 15, 1998, requesting reargument/reconsideration of the decision dated December 3, 1998 is DENIED.

PER CURIAM

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

NO. ___ E.D. ALLOC. DKT. 1999

COMMONWEALTH OF PENNSYLVANIA

V.

JOHN A. PACE,

PETITIONER

PETITION FOR ALLOWANCE OF APPEAL

(Filed Mar. 9, 1999)

PETITION FOR ALLOWANCE OF APPEAL OF THE ORDER OF THE SUPERIOR COURT, ENTERED FEBRUARY 8, 1999 IN NO. 3642 PHILADELPHIA 1997, AFFIRMING THE ORDER OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, CRIMINAL DIVISION, ENTERED BY THE HONORABLE DAVID N. SAVITT ON JULY 23, 1997, AT CC NOS. 1272, 1275.

John A. Pace, AY-6445
P.O. Box 244
Graterford, Pennsylvania
19426-0244

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ORDER IN QUESTION

The Order which is the subject of this appeal is the decision on July 23, 1997 by the Common Pleas Court of Philadelphia County at numbers 1085-1272-1275.

By Order of the Superior Court dated February 8, 1999, at No. 03642 Philadelphia 1997, the denyiny of the defendant's Post Conviction Relief petition and affirming the Common Pleas Court decision.

STATEMENT OF THE QUESTIONS INVOLVED

Is appellant entitled to Post Conviction Relief, despite the Commonwealth's objection to the contrary?

(Superior Court's answer: No.)

Whether terms of life imprisonment imposed without a discretionary minimum term for parole eligibility for crimes except first and second degree arson-murder are illegal.

(Superior Court's answer: No.)

Whether a guilty plea colloquy that failed to ensure petitioner understood consequences of plea compels withdrawal of plea.

(Superior Court's answer: No.)

Whether ineffective assistance of counsel at all levels of representation resulted in denial of due process.

(Superior Court's answer: No.)

STATEMENT OF THE CASE

PROCEDURAL HISTORY:

The petitioner, who was seventeen years old at the time, having previously been charged with murder and related offenses, was assigned to The Honorable David Savitt for trial on February 13, 1986. At that time, the petitioner plead guilty to second degree murder, and on the same date, was sentenced to mandatory life in prison. At trial, the defendant was represented by counsel Moira Dunworth and after trial, no direct appeal was taken. On or about August 21, 1986, the appellant filed a Post-Conviction Hearing Act petition, and thereafter, Franklin D. Green was appointed to represent the petitioner. An amended petition was filed on March 31, 1987 alleging trial counsel's ineffectiveness. Thereafter, a motion to dismiss hearing was held before The Honorable Joseph D. O'Keefe. On July 25, 1988, an evidentiary hearing was granted and scheduled for November 15, 1988. Mr. Green withdrew from the case, apparently for personal reasons, and then attorney David S. Rudenstein was appointed. Counsel Rudenstein then filed his amended P.C.R.A. petition, which after a hearing before The Honorable James D. McCrudden, it was Ordered dismissed on July 23, 1991. An appeal was filed October 10, 1991 by counsel Rudenstein, alleging trial counsel's ineffectiveness and The Honorable James McCrudden erred by dismissing petitioner's P.C.H.A. petition. On March 30, 1992, the Superior Court affirmed the Lower Courts decision. May 27, 1992, petitioner filed a pro se "Petition for *Permission* to file petition for Allowance of Appeal Nunc Pro Tunc." September 3, 1992, the Supreme Ordered this petition denied. On November 27, 1996, appellant filed a second P.C.R.A. Attorney David Belmont was appointed to represent

appellant on this petition. On June 17, 1997, appellant was notified by Mr. Belmont that he had filed a Turner/ Finley no-merit letter and asked for permission to withdraw from representing the appellant's P.C.R.A. petition. On June 17, 1997, appellant received notice from The Honorable David Savitt, expressing that his petition would be dismissed, but that he had ten (10) days to respond to the notice. On July 7, 1997, appellant filed an objections to counsel Belmont's Finley Letter and the Court's intent to dismiss. On July 23, 1997, appellant's petition was Ordered dismissed by Judge Savitt. A timely notice of appeal was filed. On May 6, 1998, the Commonwealth filed a letter brief stating that the PCRA Court erred by entertaining the petitioner's PCRA petition, and that the Superior Court shouldn't entertain it, because the petitioner is time bar from filing. Petitioner filed a timely reply brief. On December 3, 1998, the Superior Court ordered appellant's petition dismissed. Petitioner then filed a timely motion for reargument, which was subsequently dismissed February 8, 1999.

REASONS FOR ALLOWANCE OF APPEAL

This case presents four substantial questions that the decisions rendered below conflicts with other Superior Court and Supreme Court rulings.

In *Commonwealth v. Alcorn,* supra. that Court noted that in 1995, the General Assembly made modifications to the PCRA to govern time limits for the litigation of PCRA petitions. More specifically, the amendments bars any petition for post-conviction relief, including a second or subsequent petition, not filed within one year of the date the defendant's judgment of sentence becomes final. The

only exception being those cases that can meet the enumerated requirements, and a PCRA petition that is filed within one year of the date that the defendant's judgment is final. 42 Pa.C.S.A §9545(b)(1)(i)(ii)(iii). When appellant filed this second PCRA petition on November 27, 1996, *Alcorn* was not the law, because this Court had not decided on that case yet. *Commonwealth v. Blackwell,* supra and *Commonwealth v. Lawson,* supra was the law, and still the law. *Blackwell / Lawson* are judicial exceptions created by this Court and should be retained as a valuable relief mechanism to safeguard and check situations such as the present.

Terms of life imprisonment imposed without a discretionary minimum term for parole eligibility for crimes except first and second degree arson-murder are illegal. The Trial judge sentenced petitioner to a term of life imprisonment without a discretionary minimum for parole eligibility, which violates his right to a minimum term and parole eligibility date, as was established by 42 Pa. C.S. §9756(c).

A Guilty plea colloquy that failed to ensure that appellant understood the consequences of his plea compels withdrawal of plea. Trial Judge failed to inform the petitioner that by pleading guilty to second-degree murder, that he would receive a mandatory minimum sentence of life *without parole,* a violation of the requirements of Pa.R.Crim.P.319 and the due process provisions of the Constitutions of the United States and Pennsylvania.

Ineffective assistance of counsel at all levels of representation resulted in denial of due process and resulted in a miscarriage of justice. Trial counsel grossly misinformed the appellant, who was then seventeen years old at the

time, that by pleading guilty to second degree murder, he would be released after serving 10 to 15 years. Appellant relied on this information by trial counsel to plead guilty, only to learn that it was false. Trial counsel was ineffective and did not act in petitioner's best interest by inducing him to plead guilty to second-degree murder. PCRA counsel David Rudenstein was also ineffective in failing to subpoena trial counsel at the evidentiary hearing held March 26, 1991 to testify about her ineffectiveness, even after she admitted to him previously, via the telephone, that she didn't explain to the petitioner that he would be receiving a mandatory life sentence of life without parole. This testimony was essential, but yet he failed to call trial counsel.

ARGUMENT I

APPELLANT IS ENTITLED TO POST CONVICTION RELIEF, DESPITE THE COMMONWEALTH'S OBJECTION TO THE CONTRARY

On August 21, 1986, appellant filed a his first Post Conviction Hearing Act Petition challenging the voluntariness of his guilty plea, which occurred on February 13, 1986, six months prior. The disposition of this appeal ended with a denial of an allowance of appeal Nunc Pro Tunc by this Court on September 2, 1992. On November 27, 1996, appellant filed his second Post Conviction Relief Act petition (PCRA). The appellant filed this second *PCRA* petition out of necessity, and in hopes of receiving some measure of justice. In *Commonwealth v. Stark,* 442 Pa. Super. 127, 658 A.2d 816 (1995), that Court held that a conviction cannot stand upon a constitutional error that affected the verdict. Post Conviction review by an appellate court is limited to determining whether a trial court's

findings are supported by the record and whether its order is otherwise free of legal error.

Nevertheless, the Commonwealth argues that appellant is not entitled to any relief, and does not have access to the Courts because of the recent decision in *Commonwealth v. Alcorn,* 703 A.2d 1054 (Pa. Super. 1997). In *Alcorn,* that Court noted that in 1995, the General assembly made modifications to the PCRA to indicate time limits for the litigationo of PCRA petitions. More specifically, the amendments bars any petition for post-conviction relief, including a second or subsequent petition, not filed within one year of the date the defendant's judgment of sentence became final. The only exception being those cases that can meet enumerated requirements, and a PCRA petition that is filed within one year of the date that the defendant's judgment is final. 42 Pa.C.S.A. § 9545(b)(1)(i)(ii)(iii). Therefore, because appellant judgment of sentence was final March 13, 1986, thirty days after his guilty plea and sentencing and over ten years now, the commonwealth asks that his PCRA petition be quashed.

When appellant filed this second PCRA petition on November 27, 1996, *Alcorn* was not the law, because that Court had not decided that case yet. But, *Commonwealth v. Blackwell,* 384 Pa. Super. 251, 558 A.2d 107 (1989), and *Commonwealth v. Lawson,* 519 Pa. 504, 549 A.2d 107 (1988) was the law, and is still the law. *Blackwell/Lawson* are judicial exceptions to the waiver doctrine of the old PCRA legislation, and certainly should be retained as a judicial exception under the new PCRA legislation. The *Blackwell/Lawson* standards of review for second and subsequent PCRA petitions serves as a valuable relief mechanism and safeguard to check situations such as the present, and these decisions have not been overruled by

either the Pennsylvania Supreme Court or this Court. As well, *Alcorn,* supra. has not overruled these decisions, nor is it retroactive. So the commonwealth's reliance on this decision is misplaced, It may be assumed that these decisions are no longer valid because they have been overruled by the legislature's enactment of the new PCRA legislation. But if this is true, it creates problems on its own. That being, a violation of separation of powers encroachment on the judiciary and things of this sort. So even though the legislature did not expressly state that *Blackwell / Lawson* was overruled, they made certain that, that would be the result by stating in the text of the statute, "Any petition, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final." This "back-door" encroaching should be recognized by this Court and should be checked. The legislature is not permitted to overrule judicial decisions theoretically, expressly or otherwise, because that is the role of judiciary. Appellant urges this Court to exercise its judicial wisdom in upholding *Blackwell / Lawson,* supra. standards of review for second and subsequent PCRA petitions as a *judicial exception* to the time bar. Appellant believes that the issues presented in the instant case, demonstrates a miscarriage of justice that entitles him to PCRA review. Appellant ask that this Court review his PCRA petition under the *Blackwell / Lawson* standard and remand his case back to the lower courts for further review, or in the alternative, order a new trial based on the allegations raised therein. If this position taken by the Commonwealth is upheld, it would demonstrate a clear breakdown of the adversarial process, as well as a miscarriage of justice. Despite the existence of constitutional errors that remain unresolved in the instant case; errors

that no questions contributed to the verdict in such a way, that it undermined the truth-determining process that no reliable adjudication of innocence or guilt has taken place, the Commonwealth urges this Court to disregard all of that and quash appellant's appeal.

Again, the Commonwealth relies on the retroactive application of the amendments to the PCRA by the General Assembly *42 Pa. C.S.A. §9545(b)(1)* which states:

> (b) *Time for filing petition.*
>
> (1) Any petition under this subchapter, including a second or subsequent petition shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

Based on this section and the opinion rendered in *Commonwealth v. Alcorn,* supra., the Commonwealth's contention is that appellant is time barred from filing his second PCRA petition, and this Court does not have jurisdiction to entertain this appeal. This new amendment to the PCRA process is a severe instance of retroactivity that deprives appellant of procedural and substantive Due Process, as well as access to the Courts under the 14th. Amendment to the United States Constitution. Appellant's second PCRA petition was filed in November 27, 1996, over ten years after the final judgment was rendered in his case. Appellant challenges the PCRA's one year statute of limitation to petitions arising from judgment that became final *prior to the effective date of the PCRA.* Prior to the passage of the new PCRA legislation, a petitioner had the right to file a petition at any time after a conviction became final. The Pennsylvania Superior Court and this Court has held in previous decisions that the delay in

filing a PCRA petition, standing alone, was not a sufficient reason to deny the petition, but that the delay may be considered as a factor in assessing the petitions merit. *Commonwealth v. Johnson,* 516 Pa. 407, 532 A.2d 796 (1987); *Commonwealth v. McCabe,* 359 Pa. Super. 566, 519 A.2d 497 (1986). The Pennsylvania General Assembly has decided to take on the role of judiciary and decide that, delay by itself, can result in the dismissal of a PCRA petition. *§9545(b)(1),* supra. Thus, an individual whose conviction becomes final on or after January 16, 1996 have one year in which to file a PCRA petition, unless he/she meets one of the enumerated exceptions which follows:

> "(i) The failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claims are predicted were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a Constitutional right that was recognized by the Supreme Court of the United states or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that Court to apply retroactively.
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days from the date the claim could have been presented."

Id. § 9545(b)(1)(i)(ii)(iii)(2). Applying the new time limitation retroactively to the instant case would mean that on the effective date of the PCRA, which was January 16, 1996, without prior notice or opportunity to act, the legislature stripped appellant's rights and fair expectations as of February 13, 1986. This is completely unfair. The rights appellant had, that is, to file a PCRA petition at anytime after his conviction, was vested rights, and clearly, legislation such as the one at issue, cannot retroactively bar a petitioner from his/her ability to have a court consider the propriety of a PCRA petition without first having a reasonable time to bring the claim. The problem with the instant PCRA legislation is that, it does not give anyone fair notice. Fair notice certainly implicates due process concerns, and because of a lack of fair notice, it will deprive appellant and others similarly situated, due process of law, as well as access to the courts.

In *Miller v. Florida,* 482 U.S. 432, 107 S.Ct. 2446, 96 Led.2d. 351 (1951), the United States Supreme Court stated that a law is retrospective if it changes the legal consequences of acts completed before its effective date and that such a law was violative of due process. In the instant case, the new PCRA legislation clearly attaches new legal consequences to events that were already completed before its enactment. Since final judgment was rendered in appellant's case on March 13, 1986, an event already completed, the new legal consequences is that appellant is now time barred from filing *any* PCRA petition. In this sense, Ex Post Facto violations could be implicated. Applying the PCRA retroactively to strip completely the right of prisoners, such as appellant, to petition for PCRA relief, would be entirely unfair and a severe instance of retroactivity. The U.S. Supreme Court

has held that new legislation shortening a statute of limitations must also allow pre-existing claimants a reasonable time in which to file their claims:

> [I]t may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; *if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily,* whatever might be the purported of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action . . . "

Texaco v. Short, 454 U.S. 516, 527 n.21, 102 S.Ct. 781, 791, n21 (1982), (Quoting *Wilson v. Iseminger,* 185 U.S. 55, 22 S.Ct. 573 (1902). The Due Process Clause, is the forerunner in protecting the interest in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause may not suffice to warrant retroactive application. The Due Process clause has the ability to check the legislature's unmatched power that allow it to sweep away settled expectation suddenly and without individualized consideration.

So again, the Commonwealth reliance on *Commonwealth v. Alcorn,* supra. is misplaced. The Commonwealth argues that appellant has not established any claim that is recognizable by the limited exceptions to the time bar. Appellant believe and avers that he is also entitled to relief under *§9545(b)(1)(ii)* supra. Appellant who was seventeen years old when he entered his guilty plea on

March 13, 1986 and has no prior experience with the judiciary system, was an unskilled layman, completely ignorant of the law. Immediately upon learning the information provided to him by trial counsel was false, he filed a PCHA petition on August 21, 1986, Furthermore, appellant believes that the issue at bar concerns a question of waiver, not a question of jurisdiction as the Commonwealth argues. Since appellant could not, and still cannot allege PCRA counsel ineffectiveness for his failure to provide adequate assistance on the collateral matter; their actions went unchecked, and could have only been challenged by appellant filing this subsequent PCRA petition. *See: Commonwealth v. Beasley,* 678 A.2d 773 (1996). This Court held in *Commonwealth v. Christy* 540 192, 656 A.2d. 877 (1995), that an allegation that prior counsel was ineffective for failing to raise an issue *will* overcome the waiver provision of the PCRA *as long as appellant had a constitution right to counsel at the stage in the proceedings where counsel's ineffectiveness resulted the waiver.* All the issues that appellant is raising are trial related. Appellant challenges the illegality of his sentence, which the courts have ruled is a issue never waived. *Commonwealth v. Campbell,* supra. Appellant also challenges his guilty plea colloguy that is defective, because it fails to inform the appellant that he would be ineligible for parole by pleading guilty. This issue has never been raised and could not have been raised prior to 1992. Lastly, appellant raises the issue of ineffective assistance of all counsels. This is not a blanket accusation of ineffectiveness against all prior counsels. Appellant substantiates this claim by trial counsel's own admission to PCRA counsel Rudenstein (see exhibit D), where trial counsel acknowledge that she did not inform the appellant of the consequences of his plea. But, PCRA counsel Rudenstein, still failed to subpoenaed

her to testify on March 26, 1991, to explain exactly what she told appellant concerning his being released. These actions/ or inaction by trial counsel and PCRA counsel, must be checked.

Nevertheless, the appellant still believes that he meets the enumerated requirements for permitting a second and subsequent PCRA petition. – While it is true that petitioner did not previously articulate the fact that his delay in filing the current PCRA petition was the result of government interference, which would satisfy *42 Pa.C.S.A. § 9545(b)(1)(i),* its was in fact the reason why appellant failed to timely file his current PCRA petition. Because appellant believed that the amended PCRA legislation was not retroactiv specifically section *§545(b)(1),* he did not feel compelled to immediate file his current PCRA petition, especially since he was unprepared to do so. As previously stated, appellant believes and there fore avers that, "the failure to raise the claim previously was the result of interference by governmental officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States." *See: 42 Pa. C.S.A. § 9545(b)(1)(i).* Petitioner maintains that as result of the Camphill disturbance on October 25 and 26th of 1989, and the subsequent conduct of the prison officials deliberately destroying all inmates personal possessions, including all legal documents, impaired petitioner's ability to proceed with filing the current PCRA petition. To further support petitioners argument, enclosed herewith, as ***Exhibit E***, is partial letter which was written by appellant to the Clerk of Courts, than Peter Truman, and the letter was date stamped February 14, 1990. In the letter to the Clerk of Court, appellant is clearly explaining to the clerk that all

of his legal documents were destroyed after the durturbance Camphill in 1989. This petitioner believes should be sufficient reason to excuse his failure to timely file his current PCRA petition.

ARGUMENT II

TERMS OF LIFE IMPRISONMENT IMPOSED WITHOUT A DISCRETIONARY MINIMUM TERM FOR PAROLE ELIGIBILITY FOR CRIMES EXCEPT FIRST AND SECOND DEGREE ARSON-MURDER ARE ILLEGAL.

Appellant's argument is straight forward and simple, to Wit, that the PCRA Judge David N. Savitt erred when he granted PCRA counsel David Belmont's finley no-merit letter and when he dismissed the petitioner's PCRA petition. The appellant challenges the legality of his life imprisonment sentence without a discretionary minimum term for parole eligibility, which is an illegal sentence. This issue has never been raised before by the petitioner, nor should it be considered waived, because it is essentially an attack on the legality of the sentence, which is illegal, and would entitle the petitioner to an explicit minimum term that will engender parole eligibility.

In *Commonwealth v. Finley,* 330 Pa. 313 479 A.2d 568 (1984), which have adopted the procedures established in *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), counsel when requesting to withdraw his/her presentation of a defendant, must do so with an accompanying brief listing each issue the defendant wished to have raised, followed by an explanation as to why those issues are without merit. In the instant case, appellant challenges the legality of his life sentence

without a discretionary minimum term. Appellant has maintained this argument throughout the proceedings in this current PCRA petition.

But never do counsel Belmont acknowledge this argument or attempt to explain why this issue raised by appellant is without merit. In accordance with the rules of *Finley,* Judge Savitt should have concluded after his independent review or full examination of the record, that counsel Belmont's request to withdraw his representation should be dismissed. At best, he should have required counsel to address appellant's issues. So Judge Savitt erred when he granted counsel counsel's request to withdraw, and thus dismissing appellant's PCRA petition.

This issue by appellant is limited solely to the sentence rather then conviction, this is a challenge to the legality and constitutionality of the mandatory sentence imposed and, therefore, could not have been waived. *42 Pa.C.S.A. §9781(a); Commonwealth v. Campbell,* 351 Pa. Super. 56, 505 A.2d 262 (1986). Where the court failed to inform the appellant of his right to file a motion challenging the propriety of a mandatory sentence of life imprisonment without parole, the issue of the constitutionality of a life sentence has not been waived because it is essentially an attack on the legality of sentence. *Commonwealth v. Middleton,* 320 Pa. Super. 533 n. 5; 467 A.2d 841 (1983); Pennsylvania Rules of Criminal Procedure, Rule 1405(c)(2).

The Honorable Judge Savitt sentenced appellant Pace to a term of life imprisonment for second degree murder without an established minimum sentence for parole eligibility. Assuming, for the sake of this argument only,

that the court properly sentenced the appellant to a life term, in failing to set a minimum sentence the court violated his statutory right to parole eligibility as established by *42 Pa.C.S., §9756(c).* That section provides:

> (c) Prohibition of Parole. – Except in the case of
>
> murder of the first degree, the court may impose a sentence to imprisonment without the right to parole only when:
>
> (1) a summary offense is charged;
>
> (2) sentence is imposed for nonpayment of fines or costs, or both, in which case the sentence shall specify the number of days to be served; and
>
> (3) the maximum term or terms of imprisonment imposed on one or more indictments to run consecutively or concurrently total less than 30 days.

Because appellant was not convicted of first decree murder, and none of the other exceptions within 9756(c) applies in his case, he was entitled under the plain statutory language to have the court set a minimum sentence which, under §9756(c), could not exceed one-half the maximum, thus defining a parole eligibility date. *1 Pa.C.S.§1924.* ("Exceptions expressed in a statute shall be construed to exclude all others"). As held in *Commonwealth v. Bell,* 512 Pa. 334, 516 A.2d 1172, 1175 (1986), applying 1 Pa.C.S. §1921(b), when statutory language is clear, the judiciary must read the provisions of a sentencing statute in accordance with plain meaning and usage.

Although §9756(c) is free of ambiguity in and of itself, it must be read in connection with another statute which,

on its face, prohibits the Pennsylvania Board of Probation and Parole from exercising its power to release on parole any person serving life imprisonment. That statute, *61 Pa.Stat.§331.21*, provides that:

> The board is hereby authorized to release on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to said board, except convicts condemned to death or serving life imprisonment. . . .

Another statute, *61 Pa.Stat. §331.17*, bestows on the parole board the exclusive power to parole," and does not exclude cases in which the sentence imposed was life imprisonment.

Sections 9756(c) of Title 42 and 331.21 of Purdon's title 61, although codified in different titles of the Pennsylvania penal law, are statutes *"in pari materia"* because they "relate to the same persons or things or to the same class of persons of things." 1 Pa.C.S. §1932(a). Such statutes "shall be construed together, if possible, under one statute." *Id.* at (b). Indeed, under this definition all of the statutes within Pennsylvania's Crimes Code which pertain to sentences of life imprisonment are *"in pari materia"* with one another and with the relevant sections of Title 61, should be read together, in a manner that, "if possible, [gives] effect to all [their] provisions." 1 Pa.C.S. §1921(a).

At first reading 42 Pa.C.S. §9756(c) and 61 Pa.Stat. 331.21 might appear to be in irreconcilable conflict. The former prohibits the court from sentencing a defendant convicted of a degree of murder other than first degree, some of whom, like the appellant have been convicted of second degree murder and face life sentences, to a non

parole eligible sentence; the latter prohibits the parole board from releasing prisoners serving life terms. Yet read and applied in relation to the pertinent portions of the Crime Code and according to the Commonwealth's codified principles of statutory construction, the two statutes are, in fact, reconcilable.

There are two methods of reconciling the statutes to give both of them effect. The first is to recognized that in 1941, when the Title 61 provisions were enacted, Act of august 6, 1941, P.L. 861, the offense of murder of the first degree was the offense for which a term of life imprisonment was provided. Section 9756 (c) was not enacted until 1974. Act of Dec. 30, P.L. 1052, No. 345, transferred to Title 41 an recodified by Act of Oct. 5, 1980, P.L. 693, No. 142, §401(a). Giving effect to the language of 69756(c), it becomes clear the General Assembly did not intend to extend the reach of §331.21 to cover life sentences imposed in other than first degree murder cases. Thus, the enactment of what is now §9756(c) as part of the same 1974 criminal code reform that separated felony murder from willful and premeditated murder establishes parole eligibility in those cases.

The other method of reconciling Section 9756(c) and 331.21 involves a careful examination of the life terms provided in the Crimes Code. The legislature has specified that the terms of life imprisonment provided for certain aggravated types of murder shall be without parole. For examples, 18 Pa.C.S. §3301(b) provides that "[a] person convicted of violating the provision of subsection (a)(2) [first degree murder by person committing arson] shall be sentenced to death or life imprisonment *without the right to parole*"; the same is provided for arson-related murder in the second degree. In contrast, in section 1102(b), under

which Pace was 18 Pa.C.S. sentenced, no such prohibition appears, nor does it in 18 Pa.C.S. §1102(a), which provides a term of life imprisonment for murder in the first degree. This demonstrates that the legislature was explicit about prohibiting parole where it intended to do so. *Cf.* 1 Pa.C.S. Section 1924 ("Exceptions expressed in a statute shall be construed to exclude all others.") It did not intend to bar for life terms imposed, *inter alia,* under Section 1102(b).

When this statutory scheme is construed with sections 9756(c) and 331.21, it becomes clear that where the latter section provides parole release for "convicts . . . serving life imprisonment," it must be read as referring to those offenses for which the legislature has specified terms of life imprisonment without a the right to parole. This reading that "[w]henever a general provision in a statute [the provision in section 331.211 shall be in conflict with a special provision in . . . another statute [the opposite prohibition in Section 9756(c)), the two shall be construed, if possible, so that effect may be given to both." 1 Pa.C.S. Section 1933.

Alternatively, Sections 9756(c) and 331.21 may be seen as irreconcilable. The principle of statutory construction that statute "*in pari materia*" should be construed together is not absolute; the statute says this shall be done "if possible." 1 Pa.C.S. Section 1932 (b). If it is not possible to give effect to both of these statutes, then Section 331.21, as it pertains to persons serving life sentences for all offenses except first degree murder, must be seen as implicitly repealed, in pertinent part, by the later-enacted section 9756(c). Under 1 Pa.C.S. Section 1936, "[w]henever the provisions of two or more statutes enacted finally by different General Assemblies are irreconcilable, the statute latest in date of final enactment shall prevail." See

also 1 Pa.C.S. section 1971 ("a later statute shall not be construed to supply or repeal an earlier statute unless the two statutes are irreconcilable." Section 9756(c) of Title 42 was enacted after Section 331.21 of Title 61, as discussed above. See also 1 Pa.C.S. section 1928(b)(1) (penal provisions shall be strictly construed); *Commonwealth v. Darush,* 256 Pa. Super. 344, 389 A.2d 1165, 1158 (1978) (strict construction is in favor of the defendant); *Commonwealth v. Cluck,* 252 Pa. Super. 228, 381 A.2d 472, 477 (1977) (any ambiguity in penal statutes must be resolved in favor of life and liberty).

In *Castle v. Pennsylvania Board of Probation and Parole,* 123 Pa. Comw. 570, 554 A.2d 625 (1989), *all app. denied,* 567 A.2d 653 (1989), an action by a prisoner to compel the scheduling of a parole hearing, the other intermediate appellate court rejected the argument that section 9756(c) gave the defendant, there serving a life sentence for second-degree murder, a right to parole consideration and thereby implicitly repealed the contrary provisions in 61 Pa.Stat. Section 331.21. *Id.* at 628-29. The basis of its decision was the asserted lack of a stated purpose of Section 9756 to create parole eligibility, and the fact that the section only governs action by the trial court and not the parole board, whereas section 331.21. prohibits the board from paroling prisoners serving life terms. *Id.* For these reasons, the court did not find the two statutes "clearly irreconcilable," a prerequisite for finding repeal by implication. *Id.* at 629.

This court should decline to follow *Castle* here for two reasons. First, the *Castle* court was incorrect in stating that Section 9756 did not have as its purpose the creation of parole eligibility. Subsection (c) of that section is entitled "Prohibition of Parole," and expressly concerns parole

eligibility. It lists specific instances in which the court may sentence without the right to parole, stating that these are the "only" such instances. In light of the codified principle of statutory construction that exceptions expressed in a statute exclude all others, 1 Pa.C.S. Section 1924, it is clear that this subsection had as its purpose to and did create parole eligibility for all offenses not specified.

Second, because the General Assembly did intend Section 9756(c) to create parole eligibility, the *Castle* court was wrong in deciding that it was not irreconcilable with section 331.21. Thus, we are left with the anomaly of one statute providing a right to parole, and another prohibiting the only body empowered to release on parole from doing so. It is presumed that the "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S. Section 1922(1). The result of *Castle* is all three of these. In any event, this appeal *does* concern action of the sentencing court, which is expressly bound by Section 9756(c) and (c). Thus, at the least, this case may be readily distinguished on that basis.

All sentences imposed in Pennsylvania are for the maximum sentence. Maximum sentences are the "legal and valid" sentences imposed. *Commonwealth v. Daniels,* 430 Pa. 442, 243 A.2d 400 (1968). "The word 'sentence' when unmodified by the word 'maximum' or 'minimum' necessarily refers only to the maximum sentence for that is the legal sentence." *Commonwealth v. Glover,* 397 Pa. 543, 546-47, 156 A.2d 114 (1959). "The legislature has the right to fix the maximum penalty and likewise can, if it see fit, name the minimum." *Id.* at 5454. "When the legislature has desired to provide for a mandatory minimum in the past it has done so in unequivocal language." *Id.* at 547. The General Assembly has confirmed the

Glover court's analysis by subsequently adopting the mandatory Minimum Sentencing Act, 42 Pa.C.S.A. Sections 9712, 9714, in which specific sentences are deemed to be mandatory minimum sentences, none of which include sentences of life imprisonment. If minimum sentences 'are not implicated much less mandated by the sentencing statute, then the discretion of the trial court is necessarily the controlling factor.' *Commonwealth v. Button,* 332 Pa. Super. 239, 244; 481 A.2d 342 (1984).

The legislature clearly intended to distinguish punishment for first-degree murder and second-degree felony murder from other criminal offenses, a goal accomplished by mandating the harshest *Maximum penalty* of total confinement available. Inasmuch as the Statutory Construction Act, 46 P.S. Section 558, requires that all "penal provisions" be strictly construed in such a way that " . . . when a criminal statute calls for construction it is not the construction that is supported by the greater reason that is to prevail, but that one which, if reasonable, operates in favor of life and liberty . . ." *Commonwealth v. Glover,* supra; *Commonwealth v. Pristas,* 222 Pa. Super. 254, 260-61; A.2d 114 (1972). 18 P.S. Section 4701, 18 Pa.C.S.A. Section 1102 and 2502 and 42 Pa.C.S.A. Section 9711, must be deemed to mandate only maximum sentences of life imprisondment, not minumum setences as construed by courts and administrative agencies. It is apparent that the Superior Court views life sentences in Pennsylvania to be parole eligible inasmuch as the seven states cited by that Court as rationale for the constitutionality of consecutive sentences *all* provide for life sentences with specific minimum sentences, four which have no provision for "life without parole." *Commonwealth v. Button,* supra, 245, n. 1.

This construction of the above cited statutes is a reasonable one that "operates in favor of life and liberty." First, imposition of a sentence without a stated minimum results in a "flat" sentence with an implied minimum of one day prior to June 27, 1978. *Commonwealth v. Ulbrich,* 462 Pa. 257, 258; 341 A.2d 68 (1978); *Commonwealth v. Butler,* 458 Pa. 289, 294: 328 A.2d 851 (1974); *Commonwealth v. Auschbacher,* 276 Pa.Super. 554, 556; 419 A.2d 596 (1980). Second, life-sentenced prisoners are not precluded from the benefit of 19 P.S. Section 1057:

> Whenever any person, convicted in any court of this Commonwealth of any crime punishable by imprisonment in a state penitentiary . . . the court . . . shall pronounce upon such convict a sentence of imprisonment for an indefinite term stating in such sentence the minimum and maximum limits thereof . . .

Commonwealth v. Bulter, supra., at 291. The only parameters placed upon the minimum sentences to be imposed by the court is that "the minimum shall never exceed one-half of the maximum sentence." 19 P.S. Section 1057; 42 Pa.C.S.A. Section 9756(b). This implies that the only minimum sentence precluded by these statutes when the maximum sentences is life imprisonment is "life" itself, the very sentence presumed by the judiciary and administrative agencies.

Certainly a sentencing court may not sentence one convicted of second-degree felony murder to a lesser *Maximum* sentence than life imprisonment. The *Castle* court erred by assuming that sentences of life imprisonment are other than simply maximum sentences. Given that two purposes of the Crimes Code, 18 Pa.C.S.A. Section 104(3)(5), effective June 6, 1973, are to "safeguard

offenders against excessive, disproportionate, and arbitrary punishment" and "to differentiate among offenders with a view to just individualization in their treatment," and that components of the Crimes Code are to be construed in terms of these purposes, it is necessary to reconcile 18 P.S. Section *4701, 19 P.S. Section 1057, 18 Pa.C.S.A. 1102, 1321(e) and 2502 42 Pa.C.S.A. Section 9711 and 9756, inasmuch as none preclude another. "While [parole] is an amelioration of punishment, *it is in legal effect imprisonment. Commonwealth ex rel. Banks v. Cain,* 345 Pa. 581, 589; 28 A.2d 897 (1942); *Anderson v. Corall,* 26 U.S. 193; 44 S.CT. 43 (1923). If, under Pennsylvania law, a sentences to a five to ten year term of imprisonment is construed a ten-year sentence, *United States ex rel. McNeils v. Pa. Board of Parole.,* 141 F.Supp. 23 (1956), a sentence of one day to life imprisonment must be construed a sentence of life imprisonment and, therefore, in compliance with the foregoing statutes.

An overview of the foregoing statutes, either individually or *in pari materia,* raises reasonable constructions that favor life and liberty much more than past and current interpretations. First, the parole Act, adopted August 6, 1941, and amended to create the Pennsylvania Board of Probation and Parole December 27, 1965, has been explicitly repealed insofar as it is inconsistent with subsequent legislation, that is, with the phase 'or serving life imprisonment,' as found at 61 P.S. Section 331.21. The most noteworthy statutory refinement regarding parole eligibility for sentences of life imprisonment is found in the clear and concise language of 42 Pa.C.S.A. Section 9756, effective March 30, 1975. In Section 9756(c), the General Assembly very succinctly defined these offenders to whom parole eligibility *Must* be afforded and those to

whom the right to parole *may* be provided. Even the most cursory perusal of Section 9756(c) dictates the conclusion that, except for four (4) specific categories of offenses, the court may impose a sentence with parole eligibility Conspicuously absent from that group of offenses are second-degree felony murder [18 Pa.C.S.A. Section 1102(b)], and a subsequently conviction for an unrelated homicide [42 Pa.C.S.A. Section 9715], all of which mandate a sentence of life imprisonment. "A change of language in subsequent statutes on the same matter indicates a change of legislative intent." *Haughey v. Dillon,* 379 Pa. 1, 6; 108 A.2d 69 (1954); *Commonwealth v. Garcia,* 474 Pa. 449, 477; 378 A.2d 1199 (1977). Therefore, if the court properly sentences appellant Pace to a life term, it violated 42 Pa.C.S. Section 9756(b) and (c) by failing to set a minimum sentence, at the completion of which defendant would be eligible to be parole.

ARGUMENT III

GUILTY PLEA COLLOQUY THAT FAILED TO ENSURE PETITIONER UNDERSTOOD CONSEQUENCES OF PLEA COMPELS WITHDRAWAL OF PLEA.

Appellant entered a plea of guilty in open court to the charges of second-degree murder and possession of an instrument of crime. [N.T. pg 27]. Appellant subsequently received a life sentence without a stated minimum sentence for parole eligibility. Both the court and trial counsel failed to ascertain on the record whether appellant understood the nature and consequences of his guilty plea. Such a defective colloquy violated the requirements of Pa.R.Crim.P.319 and the due process provision of the

Constitutions of the United States and Pennsylvania, and compels withdrawal of appellant's plea.

Moreover, trial counsel grossly misinformed appellant and his family that he would be eligible for parole after serving 10 to 15 years in the state prison system. Prior to appellant entering his guilty plea, trial counsel Dunworth met with appellant's biological parents and brother to discuss the case and secure the family's support, since appellant was still a juvenile at the time. Attorney Dunworth informed appellant's family that it was her professional opinion that appellant should plead guilty to second degree murder. Attorney Dunworth also informed the family that appellant would have to serve 10 to 15 years before he would be eligible for parole. Based on their understanding of counsel's statements, the family advised appellant to plead guilty to second degree murder. [See Affidavits at Exhibit A, B, and C]. Appellant, who was seventeen at the time, would not have plead guilty had he known that he would have to spend the remainder of his life behind bars without becoming eligible for parole. As well, trial counsel admitted to appellant's former court appointed PCRA counsel David Rudenstein of her failure to properly advise appellant and his family of the consequences of his plea to second-degree murder; simply because, "she had an emotional time dealing with appellant and his family as a prospect of serving a life sentence." [See Exhibit D].

This issue has not been litigated before, nor should it be considered waived, because the Superior Court did not determine until 1992, in a case characterized as one of "first impression," that a sentence of life imprisonment is a *mandatory minimum* term. *See: Commonwealth v. Yount,* 615 A.2d 1316, 19-21, thus precluding a challenge to this

holding prior to 1992. Therefore, Judge Savitt erred when he permitted court appointed PCRA counsel David Belmont to withdraw his representation without amending appellant first PCRA petition, or requiring that counsel in his *Finley* Brief show reasons why this issue is without merit. Additionally, Judge Savitt failed to state in his opinion denying appellant's PCRA petition, his reasons why this particular issue is without merit. Judge Savitt fails to even make mention in his opinion that appellant raised this claim. The Honorable Judge Savitt should have examined the record and then determine if the issue raised was wholly frivolous. *See: Commonwealth v. Finley,* supra, at 570.

Appellant's argument is that if the conclusion of the *Castle* Court is that terms of life imprisonment imposed are mandatory minimum sentences; then the Honorable Court erred by accepting appellant's guilty plea without informing him or insuring that he understood that a consequences of his plea he would be serving a term of life imprisonment without parole. Appellant did not know that as a result of his plea, that he would spend the remainder of his life behind bars without becoming eligible for parole. Had he known, he would not have pleaded guilty. Such a defective colloquy violated the requirements of Pa.R.Crim.P.319 and the due process provisions of the Constitutions of the United States and Pennsylvania, and compels withdrawal of Petitioner's plea.

The United States Supreme Court has consistently applied stringent standards for testing the validity of a guilty plea; that is, that it was made voluntarily after proper advice and full understanding of the consequences of the plea. *McCarthy v. United States,* 394 U.S. 459, 89 S.Ct. 1166 (1969).

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable of canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences,

Boykin v. Alabama, 385 U.S. 238, 244; 89 S.Ct. 1709, 1712 (1969).

In Pa.R.Crim.P.319, the goal of which is "assurance that a defendant's guilty plea is tendered knowingly, intelligently, voluntarily and understandingly," *Commonwealth v. Persinger,* 532 Pa. 317, 322, 615 A.2d 1305 (1992), is but a restatement of this constitutional principle as well as existing law and practice. As the Third Circuit has said:

> We therefore reach the same conclusion as did the Ninth Circuit in *Munich v. United States,* 337 F.2d 356 (1964): "[O]ne who, at the time of entering a plea of guilty, is not aware of the fact that he would not be eligible for probation or parole, does not plead with understanding of the consequences of such a plea."

Berry v. United States, 312 F. 2d 189, 193 (3rd Cir. 1969). Thus, failure to advise appellant of the consequences of his plea-ineligibility for parole is equal to a denial of due process. "[P]rejudice inheres when an accused pleads guilty thus convicting himself of a criminal offense, without understanding the significance or consequences of his action." *Id.* at 191.

The mandate of Pa.R.Crim.P.319, as well as its federal counterpart, Fed.R.Crim.P.11, is designed to ensure that the pleader is apprised, at the very least, of the period of

required incarceration. Loss of parole eligibility is "an inseparable ingredient of the punishment imposed." *Id.* at 192; *In re Grand Jury Investigation,* 542 F.2d 166, 173 (3rd Cir. 1976), *cert. denied,* 429 U.S. 1047 (1977). Failure to impart information regarding "the worst to expect," in term of imprisonment is a failure to explain the consequences of a plea. *Roberts v. United States,* 491 F.2d 1236, 1238 (3rd Cir. 1974). The worst conceivable term of imprisonment is life imprisonment without parole.

Ordinarily, it would not be necessary for a trial court to include an explanation of probation or parole in its inquiry into a defendant's understanding of his plea. However, circumstances surrounding a plea that mandates a sentence of life imprisonment without the possibility of parole in not ordinary. The particular status of such defendants bring into mechanical operation a legislative directive severely restricting the freedom of action of the sentencing judge as well as the parole authority. "Under such circumstances, the knowledge of ineligibility for parole is as necessary to an understanding of the plea as is the knowledge of the maximum sentence possible." *Berry v. United States,* supra. at 192-193.

This constitutional principle was applied to Pennsylvania law by the Third Circuit Court of Appeals in *United States ex rel. Crosby v. Brierley,* 404 F.2d 790 (3rd cir. 1968), overruled *United States ex rel. Grays v. Rundle,* 428 F.2d 1401 (3rd Cir. 1970). The *Crosby* Court stated that *Pa.R.Crim.P.319* anticipates:

> . . . an inquiry of the defendant to form the factual basis that the plea is "competently and intelligently made". . . . Trial courts have a duty . . . to insure that the defendant understands the consequences of his plea. This is not so much the result of promulgations of federal and state rules of criminal procedure as it is a part of the basic concepts of proper judicial administration in Pennsylvania. . . .

Id. at 794. The rationale of *Berry,* that failure to advise a defendant, prior to acceptance of a guilty plea, of ineligibility for parole denies due process, was adopted by this in *Commonwealth v. Zober,* 466 Pa. 453, 461; 353 A.2d 441, 445 (1976).

The mandatory nature of Rule 319 was clearly established in *Commonwealth v. Ingram,* 455 Pa. 198, 316 A.2d 77 (1977). Other cases indicate that six specific areas of inquiry must be explored, the most relevant being whether the defendant is aware of the permissible range of sentences for the offenses charged. *Commonwealth v. Willis,* 417 Pa. 50, 52, 369 A.2d 1189 (1977); *Commonwealth v. Fay,* 294 Pa. Super. 332, 337, 439 A.2d 1227 (1982). Lack of such inquiry or notice deprives the defendant of "the right to weigh the alternatives of going to trial versus entering a guilty plea . . . because of the real possibility . . . that he was misled or acted pursuant to inaccurate or incorrect information" [*Commonwealth v. Leonhart,* 358 Pa. Super. 494, 501, 517 A.2d 1342 (1986)] and require that the defendant be allowed to withdraw his guilty plea. *Commonwealth v. Kulp,* 476 Pa. 358, 382 A.2d 1209 (1978). Before accepting a plea of guilty, the court must insure that the defendant understands the meaning of words like "consecutive". *Commonwealth v. Guyton,* 331 Pa. Super. 231, 480 A.2d 330 (1984). No less important are words and phases like *life imprisonment* and *mandatory minimum sentences.* "[N]o plea may be viewed as voluntary that is the product of ignorance." *Commonwealth ex rel. West v. Myers,* 423 Pa. 1, 5-6, 22 a. 2d 918 (1966).

The explicit purpose of the Crimes Code, "to give fair warning . . . of the sentences that may be imposed on conviction of an offense," is relevant. *18 Pa.C.S. §104(4).* Significantly, the ABA Standards For Criminal Justice, Second Edition at 14-1.4, provides the following:

> (a) the Court should not accept a plea of guilty . . . from a defendant without first addressing the defendant personally in open court and determining that the defendant understands:
>
> . . . . (ii) the maximum possible sentence on the charge, including that possible from consecutive sentences, and the *mandatory minimum sentence,* if any, on the charge, or any special circumstances affecting probation or release from incarceration. (emphasis added)

This Court held in *Commonwealth v. Persinger,* supra. at 323-24, that the reasoning behind the above standard is sound because it insures that the defendant appreciate the significance and consequences of his plea. *See:* also *Commonwealth v. Fay,* 294 Pa.Super. at 237. This Court went on to hold that failure of the trial court to abide by this standard results in the defendant suffering *manifest injustice.* Appellant contends that such miscarriage of justice mandates that neither "delay" nor "multiple petitions" bar PCRA or federal habeas corpus challenges to this denial of due process.

Analogous to *42 Pa.C.S. §4718,* Sections 4701, 1102, 2704, and 9715 contain no notice requirement prior to imposition of a mandatory minimum term of life imprisonment. However, "there can be no mistake that notice of intention to pursue a mandatory minimum sentence under *§ 9718* is necessary . . . before acceptance of guilty plea. Moreover, it is clear that such a requirement is born not

legislative enactment, but rather from judicial interpretation of due process guarantees whose purpose are to inform defendant of *all* of the consequences of entering a guilty plea before the act has become *fait accompli* . . . What is important is that Appellant was made aware of the consequences of his action *prior* to the acceptances of his plea." *Commonwealth v. Boyles,* 414 Pa.Super. 282, 293, 606 A.2d 1201.

A guilty plea may be attached after sentencing on three grounds: legality of sentence, jurisdiction of the court, and the voluntary, knowing, and intelligent nature of the guilty plea itself. *Commonwealth v. Alston,* 387 Pa.Super. 393, 564 A.2d 235 (1989). In determining whether guilty plea is voluntarily and understandingly entered, it is mandatory that the court ask questions to ascertain the defendant's awareness of the permissible range of sentences. *Commonwealth v. Persinger,* 532 Pa. at 321. The absence of this inquiry from the transcripts renders the colloquy defective Which, in turn, provides adequate groups for withdrawal of the plea. Counsel's failure to seek withdrawal of Petitioner's plea was, therefore, prejudicial to appellant. *Id.* at 234.

In the instant case, the Honorable Court failed to advise appellant that a consequences of his plea would be a mandatory minimum term of life imprisonment. The Court only made reference to the maximum penalty:

> Q [The Court]: If I find you guilty or if I accept the plea to second degree murder, you must know that the sentence is life imprisonment. Do you understand that?
>
> A: Yes.

N.T.43. Appellant was unaware that the forfeiture of his right to a trial by jury would result in his removal from society, without eligibility for parole, for the remainder of his life. The Court in *Commonwealth v. Carey,* 235 Pa. Superior Ct. 366, 371-72 340 A.2d 509-11 (1975), and *Commonwealth v. Bying,* 364 Pa. Superior Ct. 636 (1987) states that the voluntariness of a waiver may be vitiated by misrepresentation as to sentencing if the defendant is shown to have relied on the misrepresentation when making the decision to waive a jury trial.

That appellant was misinformed about the consequences of his plea is also evident by the comments guilty plea Attorney Dunworth made to Petitioner's PCRA/ Superior Court counsel, David S. Rudenstein:

> .... your prior counsel admitted to me on the telephone that she did not explain Life was Life without parole simply because she had a very difficult emotional time dealing with such a prospect for you and your family.

[See Exhibit D, supra.]. Trial counsel made these statements to PCRA counsel Rudenstein, that she did not inform appellant that he was pleading guilty to life sentence without parole eligibility. Moreover, her statements to both the appellant and his family [See Exhibits A, B, and C, supra.]. that he would be eligible for parole sometime after serving ten to fifthteen years was completely misleading and inaccurate to appellant. In *Strader v. Garrison,* 611 F.2d 61, 65 (1979), the Forth Circuit held that, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel;" *See: Sparks v. Sowders,* 852 F2d. 882, 885 (6th Cir. 1988).

Whether the Court was aware or unaware that appellant's understanding was factually and legally erect may be irrelevant. What is relevant is that the Court allowed petitioner to plead guilty believing that he would be eligible for release after serving a certain amount of time. If appellant known of the true and correct nature of the penalty, he would not have plead guilty. The Court's acceptance of his guilty plea under these circumstances and others, then was a complete miscarriage of justice warranting the withdrawal of the plea because before a guilty plea is accepted, a defendant must be aware of the outer limits of the punishment and the full consequences of the plea.

ARGUMENT IV

INEFFECTIVE ASSISTANCE OF COUNSEL AT ALL LEVELS OF REPRESENTATION RESULTED IN DENIAL OF DUE PROCESS.

The threshold inquiry into claims of ineffective assistance of counsel is: (1) does the underlying issue have merit, (2) was the course chosen by counsel designed to effect Petitioner's interest, and (3) did counsel's omission prejudice Petitioner. *Commonwealth v. Persinger,* supra 532 Pa. at 321.

In addition to the substantive defects in the plea colloquy set out previously, appellant contends that trial counsel was ineffective for failing to correct these defects prior to the entry of his plea. This ineffective assistance of counsel caused appellant to enter his plea unknowingly, untelligently, involuntarily, and without a full understanding of the consequences.

Trial counsel was ineffective for failing to insure that appellant, who was seventeen years old at the time, understood the terms and consequences of the plea, and explain or have the court explain that a life sentence was a mandatory minimum sentence without parole eligibility. Additionally, counsel's misleading and inaccurate statements to the appellant and his family that he would be eligible for parole after serving ten to fifteen years violated appellant's Constitutional right to competent and effective counsel. Despite trial counsel's belief that there was a defense to first and second-degree murder, she still advised the appellant to plead guilty. *See: N.T. at pg. 16.* As a result of this ineffective assistance, appellant entered his plea without a full understanding of the consequences, in violation of his constitutional rights. Trial counsel's derelictions were not reasonably designed to advance appellant's interests. In fact, counsel's deficient performance caused appellant to enter his plea unknowingly and involuntarily. *See: Commonwealth v. Persinger,* supra. at 323-24. The purpose of the plea colloquy is to insure that a defendant enters his plea knowingly, intelligently, and voluntarily, but it can not be said that trial counsel advanced appellant's interests when her deficient performance prevented this from occurring. For similar reasons, appellant was prejudiced by counsel's ineffective assistance, as counsel's deficient performance led him to enter the plea unknowing and involuntarily, thereby depriving him of his constitutional right to jury trial. Counsel's ineffectiveness further prejudiced appellant in that he has spent the past thirteen and a half years in prison as a result of a conviction that resulted from a defective and unlawfully induced guilty plea.

Thereafter, trial counsel was ineffective for failing to file a motion to withdraw the guilty plea when she knew or should have known that there was a factual and/or legal basis for the withdrawal of the plea. Appellant did not seek to withdraw his guilty plea based on the issues raised herein until because trial counsel led him to believe that there was no basis for such action and because previous appellate counsel were ineffective. Furthermore,:

> [t]he Commonwealth's position is, in essence, that appellant, who was a juvenile at the time, should have recognized, without assistance of counsel, the defect in the guilty plea colloquy and his counsel's ineffectiveness. The law does not expect so much of appellant, a layman.

Commonwealth v. Allen, 278 Pa. Super. 501, 508, 420 A.2d 653, 656 (1980). In *Commonwealth v. Wilks,* 250 Pa. Super. 182, 191, 378 A.2d 887, 891 (1977), that Court held that "to require a criminal defendant to recognize the ineptitude of his lawyer would be unreasonable."

In *Persinger,* this Court held that defense counsel was ineffective for failing to file a motion to withdraw pleas of guilty when the defendant was never advised of the possibility of consecutive sentences. In that case this Court reasoned that the defendant's claim was of arguable merit because the defect in the plea colloquy rendered the plea unknowing and involuntary, rising to the level of a manifest injustice for the reasons previously discussed. Therefore, a basis existed for the withdrawal of the plea. Having found that the defendant's claim was of arguable merit, this Court concluded that he was prejudiced by counsel's failure to file a motion to withdraw the plea. *Commonwealth v. Persinger,* supra. This Court then concluded, without the benefit of an evidentiary hearing, that there

could have been no reasonable basis designed to advance the defendant's interests for counsel's failure to file a meritorious motion on the defendant's behalf. Similarly, in the instant case, the failure to file a motion to withdraw the plea was not designed to advance Petitioner's interests and therefore prejudiced him.

In the instant case, neither counsel nor the trial court explained to appellant, nor did either seek to ascertain if he understood, that a consequence of his guilty plea could or would be a *mandatory minimum* sentence of life imprisonment without the possibility parole. Appellant had no prior experience with the criminal justice system. Moreover, counsel failed to object to the court's defective colloquy which denied appellant due process of law. Furthermore, counsel failed to raise this meritorious issue on appeal.

There could be no reason for counsel's failure to inform appellant that a special circumstance of his plea would preclude his release from incarceration for the remainder of his life. Moreover, trial counsel's gross *misinformation* to appellant and his family, that he would be eligible for parole sometime after serving ten to fifteen years, deprived Petitioner of his Constitutional right to effective assistance of counsel.

Here, as in the *Persinger* case, failure of the court to abide by Standard 14-1.4, 2nd Edition, ABA Standards For Criminal Justice, resulted in appellant "suffering manifest injustice." Because such manifest injustice provided "adequate grounds for withdrawal of [appellant's] plea, counsel's failure to seek withdrawal of [such] plea was prejudicial to [appellant] . . . There was no reasonable

basis for counsel's failure to explain the consequences of the plea and, therefore, counsel was ineffective." *Commonwealth v. Persinger*, 532 Pa. at 323, 24.

As set out previously, a PCRA petition and subsequent appeal to the Superior Court were filed by counsel Rudenstein. In that appeal, counsel challenged only the defects in the colloquy pertaining to appellant's lack of understanding of the consequences of the plea. Even with that counsel was ineffective for this reason: appellant asked counsel Rudenstein, prior to the conclusion of the PCRA evidentiary hearing, to call trial counsel Dunworth to the stand and ask her why she misinformed appellant and his family that he would be eligible for parole sometime after serving ten to fifteen years and why she failed to tell him that he would never be eligible for parole, but counsel failed to call her and establish for the record her ineffectiveness. As a result, the issues raised in the instant appeal were never presented to the court for review. Pace himself did not knowingly and intelligently fail to raise these issues in any prior proceedings. Moreover, he has demonstrated the existence of extraordinary circumstances to justify his failure to raise these issues before now. Appellant Pace never gave counsel Rudenstein permission to waive these issues, nor did counsel Rudentstein inform him that if this and other issues were not raised in that PCRA petition, these issues would be waived. Because the issues in this motion have merit, counsel Rudenstein was constitutionally ineffective for failing to pursue these issues on appeal and for failing to raise trial counsel Dunworth's ineffectiveness for failing to raise these issues.

In conclusion, counsel Rudenstein was constitutionally ineffective for failing to raise prior counsel's ineffectiveness for failing to raise the issues herein, and for failing himself to raise the issues raised herein. Thus, resulting in a miscarriage of justice.

Based on the issues raised above, Petitioner is entitled to post conviction collateral relief under *42 Pa.C.S.A § 9543(a)(2)(v).* This section provides for PCRA relief when conviction has resulted from "[a] violation of the provisions of the Constitution, law or treaties of the United States which would require the granting of Federal habeas corpus relief to a state prisoner."

In the present case, appellant was deprived of his right to a jury trial guaranteed by Sixth and Fourteenth Amendments to the United States Constitution when he entered his guilty plea unknowingly, unintelligently, and involuntarily because of the defects in the colloquy, because of the illegal sentence of life imprisonment without a stated minimum sentence for parole eligibility, and because of the deficient performance of his trial and appellant counsel. Because this claim implicates Pace's rights secured by the United States Constitution, he would be entitled to federal habeas corpus relief if there is no state procedural bar to such relief.

As discussed previously, there is a potential waiver of the issues raised herein because they were not raised previously by trial counsel or appellant counsel. However, the federal courts will excuse a state procedural default based upon a showing of cause and prejudice. *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977). Here the ineffective assistance of appellant's prior attorneys constitutes cause to excuse the procedural

default because appellant had a constitutional right to counsel at the stages in the proceeding where counsel's ineffectiveness resulted in alleged waiver. *Commonwealth v. Eaddy,* 419 Pa. Super. 48, 56; 614 A.2d at 1203. Appellant was prejudiced by this ineffective assistance for the reasons previously discussed. A convicted person has a right to an appeal and has the right to effective representation of counsel for purpose of the appeal. There is no effective representation when counsel through inadvertence of otherwise fails to raise an arguably meritorious issue on appeal. *Commonwealth v. Pfaff,* 477 Pa. 461, 384 A.2d 1179 (1978).

> This crucial right to direct review of all criminal convictions, guaranteed under the Pennsylvania Constitution, should not be lost due to the incompetent advice of prior counsel that no meritorious issues exist.

Eaddy, supra, 614 A.2d 1208.

When the failure to preserve an issue on direct appeal is the product of ineffective assistance of counsel, such failure does not result in waiver of the issue for the purpose of post conviction collateral relief. *Commonwealth v. McNeil,* 497 Pa. 187, 439 A.2d 664 (1982); *Commonwealth v. Felder,* 246 Pa. Super. 324, 370 A.2d 1214 (1976). In *Commonwealth v. Bable,* 248 Pa. Super. 496, 375 A.2d 350 (1977), the Superior Court concluded that counsel's ineffective assistance in failing to challenge the validity of a plea on direct appeal, when there was a legal basis for such a challenge, constituted an extraordinary circumstance entitling the appellant to withdraw his plea pursuant to the PCHA proceeding. Moreover, when each of appellant's PCRA previous attorneys is alleged to have rendered ineffective assistance of counsel, which if alleged

would have preserved the issue for review, the issue of ineffective assistance of counsel is itself properly preserved for review. *Commonwealth v. Bradley,* 332 Pa. Super. 99, 480 A.2d 1205 (1984); *Commonwealth v. Nelson,* 393 Pa. Super. 611, 574 A.2d 1107, 1109 (1990): *Commonwealth v. Perlman,* 392 Pa. Super. 1, 572 A.2d 2 (1990).

Appellant's claims, then, are cognizable under the PCRA even if they do not implicate the truth determining process. *Id.*, 614 A.2d at 1208.

CONCLUSION

WHEREFORE, for all the foregoing reasons, appellant respectfully request that this Honorable Court to reverse the PCRA Court's Order, Order a new trial or remand for further proceeding so that appellant can fully have these issues litigated.

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	: Trial Court Docket nos.
	: OCTOBER TERM, 1985
Appelle	: No. 1272, 1/1
	: Philadelphia 1997
vs.	: No. 03642
	:
JOHN A. PACE	: No. ___ E.D. Alloc.
Appellant	: DKT. 1999

PROOF OF SERVICE

I hereby certify that I am this 4th day of March serving the foregoing document(s) upon the person(s) and in the manner indicated below:

Service by First Class Mail Addressed as follow:

Cathrine Marshall
District Attorney's Office
1421 Arch Street
Philadelphia, PA 19102

/s/ John A. Pace
John A. Pace, pro se
P.O. Box 244, AY-6445
Graterford, PA 19426-0244

Dated: March 4, 1999

[LOGO] DISTRICT ATTORNEY'S OFFICE
1421 ARCH STREET
PHILADELPHIA, PENNSYLVANIA 19102
686-8000

LYNNE ABRAHAM
DISTRICT ATTORNEY

March 18, 1999

Charles W. Johns, Esquire
Prothonotary, Supreme Court of Pennsylvania
Room 468 City Hall
Philadelphia, Pennsylvania 19107

Re: Commonwealth v. John A. Pace
No. 120 E.D. Allocatur Docket 1999

Dear Mr. Johns:

Defendant has filed a petition for allowance of appeal in which he raises issues which are adequately disposed of in the Commonwealth's brief and the opinions below. The Commonwealth therefore will not file a formal answer to the petition, but encloses a copy of its Superior Court brief for the Court's convenience.

Very truly yours,

/s/ Catherine Marshall
CATHERINE MARSHALL
Chief, Appeals Unit

/jnj

cc: John A. Pace, (Pro Se)

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 120 E.D. Alloc. Dkt. 1999
Respondent,	:	
v.	:	Petition for Allowance of
JOHN A. PACE,	:	Appeal from the Order and
Petitioner	:	Memorandum Opinion of the Superior Court

ORDER

PER CURIAM:

AND NOW, this 29th day of July 1999, the Petition for Allowance of Appeal is DENIED.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN
DISTRICT OF PENNSYLVANIA**

**FORM FOR USE IN APPLICATIONS FOR HABEAS CORPUS UNDER 28 USC §2254
(eff. 10/18/96)**

John A. Pace **PETITIONER**
(Full name) (Include name under which you were convicted)

vs. **CASE NO.** 99CV6568
(supplied by the Court)

Donald Vaughn **RESPONDENT**
(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

and

THE DISTRICT ATTORNEY OF THE COUNTY OF Philadelphia

and

DEC 27 1999

THE ATTORNEY GENERAL OF THE STATE OF Pennsylvania
ADDITIONAL RESPONDENT

John A. Pace — AY-6445
Name — **Prison number**

SCI-Graterford
Place of Confinement

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a

motion under 28 U.S.C. §2255, in the federal court which entered the judgment.)

**PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY**

INSTRUCTIONS – READ CAREFULLY

1. This petition must be legibly handwritten or typewritten and signed by the petitioner. Any false statement of a material fact in this petition or in a motion for leave to proceed in forma pauperis may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question use reverse side of sheet.

2. Additional pages are not permitted. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

3. Upon receipt of a fee of $5.00, your petition will be filed if it is in proper order.

4. If you do not have the entire necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must complete the form on the pages eleven & twelve, setting forth information establishing your inability to prepay the full fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must submit an affidavit stating all your assets, and the certification on page thirteen, signed by an authorized prison official. Discharge of debt

in a bankruptcy proceeding shall not include a filing fee (or associated costs and expenses), regardless of an assertion of poverty by the debtor or the debtor's status as a prisoner.

5. Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

6. Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

7. All state remedies must be exhausted before filing a claim under 28 U.S.C. 2254, however, if a prisoner files such a claim before exhausting all state remedies, the federal court has authority to deny it on its merits. A federal court, when considering a state prisoner's habeas corpus petition, must deem as correct a determination of a factual issue made by a state court, unless the prisoner rebuts the presumption by clear and convincing evidence. If a petitioner has failed to develop the factual basis of the claim in state court proceedings, a federal court shall not hold an evidentiary hearing on a habeas corpus claim unless the prisoner shows that:

(1) the claim relies on either a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, or a factual predicate that

could not have previously been discovered through the exercise of due diligence; and

(2) the facts underlying the claim be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the prisoner guilty.

8. There is one-year statute of limitations for filing petitions pursuant to 28 U.S.C. 2254.

9. Federal courts must dismiss claims in a second or successive petition that were presented in a prior petition.

10. Federal courts must dismiss claims in a second or successive petition that were not presented in a prior petition unless:

(1) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(2) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence, and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the petitioner guilty.

Before such a second or successive petition may be filed in the district court, however, the petitioner must move the court of appeals for an Order authorizing the district court to consider the

petition. Petitioner's motion for such an Order must be determined by a three judge panel of the court of appeals, which must grant or deny the motion within 30 days. The court of appeals may grant the motion only if it determines that the petition makes a prima facie showing that it satisfies either (1) or (2) above.

11. Ineffectiveness of counsel during post-trial proceedings in state court shall not be grounds for relief under 28 U.S.C. 2254.

12. When the petition is fully completed, the, original and four copies must be mailed to the Clerk of the United States District Court whose address is ROOM 2609, 601 MARKET STREET, PHILADELPHIA, PENNSYLVANIA 19106.

13. Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. **(a) Name and location of court which entered the judgment of conviction under attack:** Common Pleas Court, Trial Division, Phila, Coun

   (b) Name of Prosecutor: Charles Gallaher

   (c) Prosecution conducted by District Attorney's Office of Philadelphia **County**

2. **(a) Date of Judgment of conviction:** February 13, 1999

   (b) Indictment number or numbers: _____

Term: October, 1985
Criminal Case Number: 1272

3 **Length of sentence:** Life
Sentencing Judge: David Savitt

4. **Nature of offense or offenses for which you were convicted:**
Second degree murder, and possession of Instrument of Crime.

5. **What was your plea? (check one)**

   (a) Not Guilty ( ) (b) Guilty (x)
   (c) Nolo contendere ( )
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:_____

6. **Kind of trial: (check one)**

   (a) Jury ( ) (b) Judge only (x)

7. **Did you testify at the trial? Yes ( ) No (x)**

8. **Did you appeal from the judgment of conviction?**

   Yes (x) No ( )

9. **If you did appeal, answer the following:**

   (a) Name of court: Common Pleas, and Superior Court (PCHA petition)

   (b) Result: Denied

   (c) Date of Result: March 30, 1992

If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details:

_____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes (x) No ( )

11. If your answer to 10 was "yes", give the following information:

(a) (1) Name of Court: Philadelphia County, PA

(2) Nature of proceeding: Post Conviction Hearing Act Petition

(3) Grounds raised: Trial counsel was ineffective for failing to provide the defendant with effective assistance of counsel, and advising the defendant to plead guilty to second degree murder, and informing him that he would be released after serving ten, twelve, or fifteen years, and that it was not the end of his life.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes (x) No ( )

(5) Result: Petition denied

(6) Date of result: March 30, 1992

(b) As to any second petition, application or motion give the same information:

(1) Name of Court: Philadelphia County, PA

(2) Nature of proceeding: Post Conviction Relief Act Petition

(3) Grounds raised: Terms of Life imprisonment imposed without a discretionary minimum term for parole eligibility for crimes except first and second degree arson-murder are illegal

(2) Guilty Plea colloquy that failed to ensure Petitioner understood consequences of plea compels withdrawal of plea.

(3) Ineffective Assistance of counsel at all levels of representation resulted in denial of due process.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No (x)

(5) Result: Denied

(6) Data of result: March 30, 1992

(c) As to any third petition, application or motion, give the same information:

* * *

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc. Yes (x) No ( )

(2) Second petition, etc. Yes (x) No ( )

(3) Third petition, etc. Yes ( ) No ( )

* * *

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For information, the following is a list of most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all you state court remedies with respect to them, However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: (1) Conviction obtained by plea of guilty which was unlawfully induced and was unknowingly and involuntarily entered.

Supporting FACTS (tell your story *briefly* without citing cases or law): Petitioner who was seventeen at

the time, was charged with murder robbery, possessing instrument of a crime generally on September 30, 1985. He was subsequently appointed attorney Moira Dunworth. After meeting with counsel Dunworth about twice, she advised the petitioner, his brother, mother and father that it was in his best interest to plead guilty to second degree murder. Petitioner asked her how much time would he have to serve, and she said ten, twelve, or fifteen years, and that it was not the end of his life. So the petitioner plead guilty on February 13, 1986 believing that he would be released after serving the above number of years. Petitioner who was seventeen (17) years old at the time, who never been incarcerated before, and had no prior convictions, would not have plead guilty had he known that he would not be eligible for parole and had to serve the remaining of his life in prison. Trial counsel Moira Dunworth has since admitted that she did not explain to the petitioner that life was life without parole, because she had a difficult time dealing with such a prospect for the him. (This information was conveyed to PCHA counsel David Rudenstein, via telephone call, and he informed the petitioner in a letter dated May 21, 1990. Exhibit D of the Supreme Court Brief. Yet, Mr. Rudenstein failed to subpoena trial counsel Dunworth to testify to exactly what she did tell petitioner regarding his plea.

B. Ground two: Denial of petitioner's right to effective assistance of counsel. Sixth Amendment Violation. Denial of Due Process. Fourteenth Amendment.

Supporting FACTS (tell your story *briefly* without citing cases or law: Trial counsel was aware that if the petitioner plead guilty to second-degree murder that he would be ineligible for parole and have to spend the remaining of his life in prison. But still trial counsel Moira

Dunworth grossly mislead the petitioner to believe that he would be released after serving ten, twelve, or fifteen years. Her actions to have the petitioner plead guilty to second-degree murder believing that he would be released after serving a number of years was not in the petitioner's best interest. Petitioner was seventeen (17) years old at the time, and had a documented history of substance abuse problems; and he was intoxicated the night of the incident. Also, trial counsel believed that a defense existed for second-degree murder, when she argued before the court on February 13, 1996, when exactly did the intent to rob Mr. Baldwin occurred. See N.T. pages. 15-16. This is according to one of the statements the petitioner gave. But still counsel advised the petitioner to plead guilty with the understanding that he would released after serving ten, twelve or fifteen years. Petitioner would not had plead guilty had he known that he would not be eligible for parole, and would remain in prison for the rest of his life.

C. Ground three: Denial of Due Process. Sixth Amendment Violation. Denial of Equal Protection of the Law. Fourteenth Amendment, and Cruel and Unusual Punishment Eight Amendment Violation.

Supporting FACTS (tell your story *briefly* without citing cases or law: Terms of Life imprisonment imposed without a discretionary minimum term for parole eligility for crimes except first and second degree arson-murder are illegal, and violates petitioner's due process rights. Equal protection of the Law Guaranteed by the Fourteenth Amendment, and violates the Eight Amendment's Ban against Cruel and Unusual Punishment Petitioner was sentenced under statute 18 Pa.C.S. 1102(b) which imposes a Life imprisonment sentence. Under 42 Pa.C.S. §9756(c) that section provides that with the exception of cases of

murder of the first degree, and certain other summary offenses §9756(c)(1)(2)(3), the court may impose a sentence to imprisonment without the right to parole. Second-degree murder is not excluded in this statute of those prohibited from being parole eligible. This statute was enacted in 1974 under the new sentencing code. This would entail that petitioners who were sentenced under 18 Pa.C.S. 1102(b) is entitled to the benefits of 19 P.S. Section 1057, which provides that any person convicted in any court of this Commonwealth be sentence to a minimum and maximum limit thereof.

But a conflict exist with the above statute, because Pennsylvania Legislators in 1941 enacted 61 Pa. Stat §331.21 which prohibits the parole board from releasing on parole any person convicted of death or serving a life imprisonment. It was enacted August 6, 1941. So there appears to be an irreconcilable conflict between these two statutes, because one statute provides the petitioner with the right to parole, and the other one prohibits the petitioner from being released on paroled. As well, 61 Pa.Stat. §331.17, bestows on the parole board the "exclusive power to parole," and does not exclude cases in which the sentence imposed was life imprisonment. The only time Pennsylvania Legislators specified that the terms of life imprisonment for murder shall be without parole, was for certain aggravated types. For example, 18 Pa.C.S. §3301(b) provides that "[a] person convicted of violating the provision of subsection (a)(2) [first degree murder by person committing arson] shall be sentenced to death or life imprisonment *without right to parole*" the same as provided for arson-murder in the second degree.

So, the Honorable Judge Savitt violated the petitioner's statutory right in failing to set a minimum sentence, and

providing the petitioner with a parole eligibility date as established by 42 Pa.C.S. §9756(c). The solution is that the two statutes are irreconcilable, and the later statute should have repealed the earlier one. Thus, Petitioner was allowed to plead guilty to an illegal sentence, violating his Due Process rights under the Sixth Amendment. And, he is presently being denied Equal Protection of the law Guaranteed under the Fourteenth Amendment, as he is being held under an illegal sentence. Petitioner believes that this treatment that he is being subjected to is Cruel and Unusual, and violates his Eight Amendment rights.

* * *

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ( ) No (x)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: Moira Dunworth, 1422 Chestnut Street Suite 709-10, Philadelphia, Pa. 19102

(b) At arraignment and plea: Moira Dunworth, 14213 Chestnut Street Suite 709-10, Philadelphia, Pa. 19102

(c) At trial: Moira Dunworth

(d) At sentencing: Moira Dunworth

(e) On appeal: PCHA

(f) In any post-conviction proceedings: Franklin D. Green and David S. Rudenstein, 1204, Two Penn Center, Philadelphia, Pa. 19102

* * *

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ( ) No (x)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ( ) No (x)

* * *

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 22, 1999 /s/ John A. Pace
Signature of Petitioner

pro se
Signature of Attorney (if any)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATEMENT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

JOHN A. PACE **PETITIONER**

vs.

DONALD VAUGHN **RESPONDENT(S)**

I, John A. Pace, **declare under the penalty of perjury, that I as the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay any or all of the required fees, costs or give security therefor at this time, I declare that because of my poverty I am unable to pay any or all of the costs of said proceeding or to give security therefor at this time and that I believe I am entitled to relief.**

1. Are you presently employed? Yes (x) No ( )

a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

Thirty-three cents a hour in the Para-Professional Law Clinic at the State Correctional Institution at Graterford

2. Have you received within the last twelve months any money from any of the following sources?

a. Business, profession or form of self-employment?

Yes ( ) No (X)

b. Rent payments, interest or dividends?

Yes ( ) No (x)

c. Pensions, annuities or life insurance payments?

Yes ( ) No (x)

d. Gifts or inheritances? Yes (x) No ( )

e. Any other sources? Yes ( ) No (x)

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. $100.00 from my sister Mary 8/20/99

3. Do you own cash, or do you have money in a checking or savings account? Yes ( ) No (x)

If the answer is "yes", state the total value of the items owned.

4. Do you on any real estate, stocks, bonds, notes, automobiles, or other valuable property (exclude ordinary household furnishings and clothing)?

Yes ( ) No (x)

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. NO ONE

* * *

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on December 22, 1999 **(Date)** /s/ John A. Pace **(Petitioner's Signature)**

CERTIFICATE

I hereby certify that the petitioner herein has the sum of $15.51 **on account to his credit at the** SCI Graterford **institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said _____ institutions: _____**

/s/ Patricia Crull
Authorized Prison Official

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE — CIVIL ACTION

V.

DONALD VAUGHN, et al. — NO. 99-6568

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

(Filed Apr. 6, 2000)

LYNNE ABRAHAM, District Attorney of Philadelphia County, by **JOHN W. GOLDSBOROUGH**, Assistant District Attorney, **THOMAS W. DOLGENOS**, Assistant District Attorney, and **DONNA G. ZUCKER**, Chief, Federal Litigation, on behalf of respondents, respectfully requests that the Petition for Writ of Habeas Corpus be denied without a hearing, and, in support thereof, states:

1. A *seriatim* answer is dispensed with for the sake of clarity.

2. On February 13, 1986, petitioner pled guilty before the Honorable David N. Savitt to the second-degree murder of Randolph Baldwin and possessing an instrument of crime ("PIC") (Nos. 1272, 1275, October term, 1985). Judge Savitt sentenced him to life imprisonment for the murder, plus a concurrent term of one to two years for PIC. Petitioner did not move to withdraw his plea or to modify the sentence, nor did he appeal.

3. Six months later, petitioner filed a *pro se* petition for relief under the Post Conviction Hearing Act (PCHA), 42 Pa.C.S. §§ 9541-9551 (1982).

4. Counsel was appointed and filed an amended petition. After a hearing on the Commonwealth's motion to dismiss, but before a decision had been rendered, counsel withdrew.

5. New counsel was appointed and filed a second amended petition, alleging trial counsel's ineffectiveness. Judge Savitt held another evidentiary hearing, and on July 23, 1991, he dismissed Pace's petition.

6. Petitioner appealed to the Superior Court of Pennsylvania, which affirmed the denial of post-conviction relief on March 30, 1992 in an unpublished memorandum. *Commonwealth v. Pace*, 421 Pa. Super. 635, 612 A.2d 535 (1992) (Table). Petitioner filed a petition for allowance of appeal to the Pennsylvania Supreme Court, which that Court denied on September 2, 1992.

7. On November 27, 1996, over ten years after his sentence became final, petitioner filed his second petition for state collateral relief, under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. Counsel was appointed and filed a petition to withdraw and a "no-merit" letter. Judge Savitt granted counsel's petition to withdraw and dismissed the petition on July 23, 1997.

8. Petitioner appealed *pro* se, and the Superior Court affirmed in an unpublished memorandum. *Commonwealth v. Pace*, 736 A.2d 12 (Pa. Super. 1998) (Table). A copy of the Superior Court's memorandum is attached as Exhibit A. The Pennsylvania Supreme Court denied allowance of appeal on July 29, 1999. *Commonwealth v. Pace*, ___ Pa. ___, 740 A.2d 1146 (1999) (Table).

9. On December 27, 1999, petitioner filed the present *pro se* Petition for Writ of Habeas Corpus.

Respondents deny that petitioner is entitled to federal habeas review or relief. His petition is time-barred and must, accordingly, be denied.)[1]

DISCUSSION

THE PETITION MUST BE DENIED AS TIME-BARRED UNDER 28 U.S.C. SECTION 2244(d).

The present petition is governed by the federal habeas corpus statute, 28 U.S.C. section 2241 *et seq.*, amended effective April 24, 1996, by the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Section 2244(d) of AEDPA includes a strict one-year time limitation on the filing of new petitions:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a **properly filed** application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d) (emphasis added).

AEDPA's limitations period has been construed to allow prisoners a one-year "grace period" following April 24, 1996 during which to initiate their habeas actions, regardless of the date on which final review concluded, if their convictions became final before that date. *Burns v. Morton*, 134 F.2d 109, 111 (3d Cir. 1998); *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996), *reversed on other grounds*, 117 S.Ct. 2059 (1997). Since petitioner's conviction became final on March 14, 1986, the "grace period" applies to his case. *Kapral v. United States*, 166 F.3d 565, 575 (3d Cir.

[1] Since the timeliness issue is dispositive, respondents have neither appended copies of petitioner's briefs and the state court opinions nor recited the issues examined therein. Should the court wish to review these issues and/or documents, respondents will provide them.

1999). Thus, petitioner had until April 23, 1997 within which to file his habeas petition.

After the grace period had begun to run, on November 27, 1996, petitioner filed his second petition for state collateral relief, under the Post [-] Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. The Superior Court determined that this petition was untimely under the 1995 amendments to the PCRA, and, accordingly, the PCRA court had no jurisdiction to entertain it. *Commonwealth v. Pace* (Pa. Super. 1998) (Exhibit A) at 6. It follows that this petition did not serve to toll AEDPA's limitations provision, for a late PCRA petition is not "properly filed" within the meaning of the federal habeas statute. 28 U.S.C. § 2244(d)(2). *See Morris v. Horn*, 187 F.3d 333, 338 (3d Cir. 1999) (state post-conviction petition dismissed on grounds of untimeliness does not toll statute of limitations under AEDPA); *Lovasz v. Vaughn*, 134 F.3d 146 (3d Cir. 1998) (a "properly filed" application for state collateral review for the purpose of AEDPA's tolling provision is one that is "submitted according to the state's procedural requirements, such as the rules governing the time and place of filing"). *See also Webster v. Moore*, 199 F.3d 1256 (11th Cir. 2000); *Dictado v. Ducharme*, 189 F.3d 889, 891-92 (9th Cir. 1999). Thus, petitioner's second PCRA petition had no effect upon AEDPA's statute of limitations. The latest date on which petitioner could have instituted a timely habeas action remained April 23, 1997.

The present petition was filed on December 27, 1999, **over two and one-half years** after that deadline.

Petitioner satisfies none of the exceptions to the statute of limitations set forth in section 2244(d)(1)(B)-(D). No state action prevented the timely filing of this habeas

action; petitioner does not rely on a new rule of retroactively applicable constitutional law; and the factual predicates upon which his claims are based stem from events that occurred at trial and were thus discoverable in the exercise of due diligence long ago. His petition is time-barred and must be dismissed.

WHEREFORE, respondents respectfully request that the Petition for Writ of Habeas Corpus be denied without a hearing.

Respectfully submitted,

/s/ John W. Goldsborough
JOHN W. GOLDSBOROUGH
Assistant District Attorney

/s/ Thomas W. Dolgenos
THOMAS W. DOLGENOS
Assistant District Attorney
DONNA G. ZUCKER
Chief, Federal Litigation

[Exhibits Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE [AY-6445]	:	CIVIL ACTION
v.	:	
DONALD VAUGHN, et al.	:	NO. 99-6568

REPORT AND RECOMMENDATION

April 28, 2000

M. FAITH ANGELL
UNITED STATES MAGISTRATE JUDGE

Presently before this Court is a *pro se* Petition for Writ of Habeas Corpus filed, pursuant to 28 U.S.C. §2254, by a state prisoner. Petitioner is currently incarcerated at State Correctional Institution ["SCI"] Graterford, Pennsylvania, where he is serving a life sentence for second-degree murder and related offenses. For the reasons which follow, it is recommended that the Petition for Writ of Habeas Corpus be denied and dismissed as untimely under 28 U.S.C. §2244(d)(1).

BACKGROUND[1]

On February 13, 1986, Petitioner pled guilty before the Honorable David N. Savitt of the Court of Common Pleas of Philadelphia County to the second-degree murder of Randolph Baldwin and possession of an instrument of crime ["PIC"]. Judge Savitt sentenced Petitioner to life

[1] The facts in this discussion have been taken from Mr. Pace's habeas petition, and the Commonwealth's response (with exhibits).

imprisonment for the murder conviction, plus a concurrent term of one to two years imprisonment for the PIC conviction. Exhibit "A" of the Commonwealth's Response to the habeas petition (the December 3, 1998 Superior Court Opinion) at 1.

Mr. Pace did not file a motion to withdraw or to reconsider his guilty plea. Nor did he file a direct appeal.

On August 21, 1986, Petitioner filed a *pro se* petition under the Pennsylvania Post Conviction Hearing Act ["PCHA"], 42 Pa. C.S.A. §9541, *et seq.*[2] Counsel was appointed; he filed an amended PCHA petition. The Commonwealth filed a motion to dismiss, which was denied after a hearing. After the Commonwealth's motion was denied, PCHA counsel withdrew. Replacement counsel was appointed. *Id.* at pp.1-2.

New counsel filed a second amended petition on November 29, 1989. Included in this second petition were claims of ineffective assistance of trial counsel and trial court error in "misleading Petitioner into believing that he would be eligible for parole even though he received a mandatory life sentence." Exhibit "A" of the Commonwealth's Response (the December 3, 1998 Opinion) at p.2.

The Commonwealth moved to dismiss the second amended PCHA petition and a hearing was held. On July 23, 1991, the PCHA Court granted the Commonwealth's motion to dismiss.

[2] The Post Conviction Relief Act ["PCRA"] replaced the Post Conviction Hearing Act in 1988.

Petitioner appealed. On March 30, 1992, the Superior Court affirmed the PCHA Court's decision. Mr. Pace sought discretionary review in the Supreme Court of Pennsylvania. *Allocatur* was denied on September 2, 1992.

On November 27, 1996, Petitioner filed a second request for collateral relief, this time under the PCRA. Counsel was appointed; he subsequently filed a petition to withdraw and a "no merit" letter.

On July 23, 1997, the PCRA Court granted counsel's petition to withdraw and dismissed Mr. Pace's second collateral petition as meritless. Exhibit "A" of the Commonwealth's Response (the December 3, 1998 Opinion) at p.3.

Petitioner filed an appeal to the Superior Court. The Superior Court affirmed the denial of PCRA relief, holding that Mr. Pace's second collateral petition was untimely under 42 Pa.C.S.A. §9545(b), as amended by Act of November 17, 1995, P.L. 1118, No. 32 (Spec. Sess. No. 1), §1. According to the Superior Court, Mr. Pace's second petition for post-conviction relief, filed more than ten years after his judgment of conviction became final on March 14, 1986, was untimely and did not fit within any of the statutory exceptions set forth in 42 Pa.C.S.A. §9545(b)(1). "Therefore, the PCRA court lacked jurisdiction [over Petitioner's second petition] and its dismissal of the petition was proper." *Id.* at p.6.

Allocatur review was declined by the Pennsylvania Supreme Court on July 29, 1999. On December 27, 1999, Petitioner filed the instant habeas petition, his first. In it, he raises the following three overlapping claims:

1. Conviction obtained by plea of guilty which was unlawfully induced and was unknowingly

and involuntarily entered. Petitioner who was seventeen at the time, was charged with murder, robbery, possessing an instrument of crime generally on September 30, 1985. He was subsequently appointed attorney Moira Dunworth. After meeting with counsel Dunworth about twice, she advised the petitioner, his brother, mother and father that it was in his best interest to plead guilty to second degree murder. Petitioner asked her how much time would he have to serve, and she said ten, twelve or fifteen years, and that it was not the end of his life. So the petitioner pleaded guilty on February 13, 1986 believing that he would be released after serving the above number of years. Petitioner who was seventeen (17) years old at the time, who never been incarcerated before, and had no prior convictions, would not have pled guilty had he known that he would not be eligible for parole and had to serve the remaining of his life in prison. Trial counsel Moira Dunworth has since admitted that she did not explain to the petitioner that life was life without parole, because she has a difficult time dealing with such a prospect for the him. (This information was conveyed to PCHA Counsel David Rudenstein, via telephone call, and he informed the petitioner in a letter dated May 21, 1990. Exhibit D of the Supreme Court brief. Yet, Mr. Rudenstein failed to subpoena trial counsel Dunworth to testify to exactly what she did tell Petitioner regarding his plea.

2. Denial of petitioner's right to effective assistance of counsel. Sixth Amendment violation. Denial of due process. Fourteenth Amendment. Trial counsel was aware that if the petitioner plead guilty to second-degree murder that he would be ineligible for parole and have to spend

the remaining of his life in prison. But still trial counsel Moira Dunworth grossly mislead the petitioner to believe that he would be release after serving ten, twelve or fifteen years. Her actions to have the petitioner plead guilty to second-degree murder believing that he would be released after serving a number of years was not in the petitioner's best interest. Petitioner was seventeen (17) years old at the time, and had a documented history of substance abuse problems; and he was intoxicated the night of the incident. Also, trial counsel believed that a defense existed for second-degree murder, when she argued before the court on February 13, 1996, when exactly did the intent to rob Mr. Baldwin occurred. See N.T. pages 15-16. This is according to one of the statements the petitioner gave. But still counsel advised the petitioner to plead guilty with the understanding that he would be released after serving ten, twelve or fifteen years. Petitioner would not had pled guilty had he known that he would not be eligible for parole, and would remain in prison for the rest of his life.

3. Denial of due process. Sixth Amendment violation. Denial of equal protection of the law. Fourteenth Amendment, and Cruel and Unusual punishment, Eighth Amendment violation. Terms of life imprisonment imposed without discretionary minimum term for parole eligibility for crimes except first and second degree arson-murder are illegal, and violate petitioner's due process rights. Equal protection of the law guaranteed by the Fourteenth Amendment. And violates the Eighth Amendment's ban against cruel and unusual punishment. Petitioner was sentenced under statute 18 Pa.C.S. 1102(b) which imposes a life imprisonment sentence. Under 42 Pa.C.S. §9756(c) that

section provides that with the exception of cases of murder of the first degree, and certain other summary offenses §9756(c)(1)(2)(3), the court may impose a sentence of imprisonment without the right to parole. Second-degree murder is not excluded in this statute of those prohibited from being parole eligible. This statute was enacted in 1974 under the new sentencing code. This would entail that petitioners who were sentenced under 18 Pa.C.S. 1102(b) is entitled to the benefits of 19 P.S. Section 1057, which provides that any person convicted in any court of this Commonwealth be sentenced to a minimum and maximum limit thereof.

But a conflict exist with the above statute, because Pennsylvania legislators in 1941 enacted 61 Pa. Stat. §331.21, which prohibits the parole board from releasing on parole any person convicted of death or serving a life imprisonment. It was enacted August 6, 1941. So there appears to be an irreconcilable conflict between these two statutes, because one statute provides the petitioner with the right to parole, and the other one prohibits the petitioner from being released on parole. As well, 61 Pa.Stat. §331.17, bestows on the parole board the "exclusive power to parole," and does not exclude cases in which the sentence imposed was life imprisonment. The only time Pennsylvania legislators specified that the terms of life imprisonment for murder shall be without parole, was for certain aggravated types. For example, 18 Pa.C.S. §3301(b) provides that "[a] person convicted of violating the provision of subsection (a)(2) [first degree murder by person committing arson] shall be sentenced to death or life imprisonment *without right to parole*" the same is provided for arson-murder in the second degree.

So, the Honorable Judge Savitt violated the petitioner's statutory right in failing to set a minimum sentence, and providing the petitioner with a parole eligibility date as established by 42 Pa.C.S. §9756(c). The solution is that the two statutes are irreconcilable, and the later statute should have repealed the earlier one. Thus, Petitioner was allowed to plead guilty to an illegal sentence, violating his Due Process rights under the Sixth Amendment. And, he is presently being denied Equal Protection of the law guaranteed under the Fourteenth Amendment, as he is being held under an illegal sentence. Petitioner believes that this treatment that he is being subjected to is Cruel and Unusual, and violates his Eighth Amendment rights. *See* Mr. Pace's habeas petition: Grounds and Supporting Facts.

DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 [the "AEDPA" or the "Act"], signed into law on April 24, 1996, significantly amended the laws governing habeas corpus petitions.

One of the amended provisions, 28 U.S.C. §2244(d), imposes a one-year statute of limitations on state prisoners who seek federal habeas relief. A habeas petition must be filed within one year from the date on which the petitioner's judgment of conviction becomes final. *See* 28 U.S.C. §2244(d)(1).[3]

[3] While the date on which the petitioner's conviction becomes final is typically the start date for the limitations period, the statute permits the limitation period to run from four different points in time, depending on which occurs latest. In addition to the date on which the

(Continued on following page)

In applying the one-year statute of limitations to convictions which became final before the AEDPA was signed into law, the Third Circuit has held that habeas petitions filed on or before April 23, 1997, may not be dismissed for failure to comply with §2244(d)(1)'s time limit. *See Burns v Morton*, 134 F.3d 109, 111 (3d Cir. 1998).

In the instant case, Mr. Pace's state conviction became final on March 14, 1986. This is the last date on which Petitioner could file a timely direct appeal to the Superior Court of Pennsylvania. Because his state court proceedings concluded before the effective date of the AEDPA, Mr. Pace would not have been barred by the statute of limitations from filing a habeas petition on or before April 23, 1997. The instant habeas petition was not filed for over two and one-half years beyond the time limit set by §2244(d)(1).

The fact that Mr. Pace filed a PCRA petition in the state system, which was pending during the one-year grace period does not toll the habeas statute of limitations. The Third Circuit has held that "a properly filed application" under the tolling provision of 28 U.S.C. §2244(d)(2) is defined as a petition submitted according to the state's

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petitioner's conviction becomes final, the start date can also run from: (1) "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action"; (2) "the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review"; or (3) "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

In the instant case, there is nothing in the pleadings before me to suggest that the start date for the statute of limitations period should be permitted to run from a point later in time than the date on which Mr. Pace's conviction became final.

procedural requirements, such as the rules governing time and place of filing. *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d. Cir. 1998). Mr. Pace's PCRA petition (filed on November 27, 1996 and pending on appeal through July 29, 1999) was dismissed as untimely by the Superior Court because it was filed outside the one year statute of limitations governing collateral petitions filed under the PCRA statute. Because Petitioner's untimely PCRA petition was not properly filed and did not comply with state procedural rules, the federal habeas tolling provision does not apply, and the instant habeas petition must be dismissed as time-barred under 28 U.S.C. §2244(d)(2).

RECOMMENDATION

For the reasons stated above, it is recommended that the Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254, be DENIED AND DISMISSED AS TIME-BARRED. It is further recommended a finding be made that there is no probable cause to issue a certificate of appealability.

BY THE COURT:

/s/ M. Faith Angell
M. FAITH ANGELL
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE	:	CIVIL ACTION
V.	:	
DONALD VAUGHN, et al.	:	NO. 99-6568

PETITIONER'S OBJECTION TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

(Filed May 18, 2000)

NOW COMES JOHN A. PACE, petitioner above-named, files the following as his Objection to Magistrate Judge's Report and Recommendation:

ARGUMENT

I. PETITIONER'S PETITION SHOULD NOT BE DISMISSED AS TIME-BARRED, AS IT DOES MEETS THE REQUIREMENTS OF 28 U.S.C. SECTION 2244 (d)(2)

Petitioner received Respondent's Response to his Writ of Habeas Corpus on April 7, 2000, and he was prepared to respond when he received the Magistrate Judge's Report and Recommendation on May 3, 2000. In this Report and Recommendation, the Magistrate Judge Faith Angell agreed with the Respondent that petitioner's habeas petition should be dismissed as being time-barred because it was filed on December 27, 1999, over two and one-half years beyond the time limit set by §2244(d)(1). This amended provision deals with a one-year statute of limitations on state prisoners who seek federal habeas relief, and it came into existence under the Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA]; which was

signed into law on April 24, 1996. This provision indicates that a habeas petition must be filed within one year from the date on which the petitioner's judgment of conviction becomes final.

So the Respondent and Magistrate Judge points out that petitioner's conviction became final on March 14, 1986, but he would not have been barred by the statute of limitations from filing a habeas petition on or before April 23, 1997. But, the fact that the petitioner filed a second PCRA petition on November 27, 1996, and the Superior subsequently ruled that it was untimely, his present habeas petition was not tolled under the tolling provision of 28 U.S.C. §2244(d)(2). They both cited *Lovasz v. Vaugh* 134 F.3d 146, 168 (3d Cir. 1998), in which the Third Circuit has held that "a properly filed application" under the tolling provision of 28 U.S.C. §2244(d)(2) is define as a petition submitted according to the state's procedural requirements, such as the rules governing time and place of filing. So because petitioner's PCRA petition was dismissed as untimely by the Superior Court, and was not properly filed according to the rules governing PCRA. As well petitioner filed outside of the one year and did not comply with state procedural rules, the federal habeas tolling provision does not apply. So the instant habeas petition must be dismissed as time-barred under 28 U.S.C. §2244(d) (2).

Petitioner believes that his habeas petition should not be dismissed as untimely, and he is entitled to federal habeas review and relief as he believes that he meets the requirements set forth in 28 §2244 (d)(1)(b)(d) and (2).

The present petition before this court is governed by the federal habeas corpus statute, 28 U.S.C. section 2241

et seq., and true it has a provision within it that places time limitations on state prisoners to file a habeas petition. §2244 (d)(1). And, in order to trigger the tolling provision, the petitioner must meet one of the exceptions enumerated in §2244 (d)(1)(b)-(d)(2):

> (1) A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims

> presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Thus allowing this provision to be subject to equitable tolling. In *Miller v. New Jersey Department of Correction*, 144 F.3d 616, 618 (3d Cir. 1998), the Third Circuit Court held that the one-year limitation period in 2244 (d)(1) is a statue of limitations, not a jurisdictional bar, and thus subject to equitable tolling or consideration in extraordinary circumstances. Thus, consideration can be given if the petitioner was prevented from asserting his right to file "in an extraordinary way," *Osniver v. Levin Fishbein, Sedran & Berman*, 38 F.3d 1380 (3d Cir.1994). However, the petitioner must show that he exercised reasonable diligence in investigating and bringing the claims. *New Castle County v. Halliburton NUS Corp*, 111 F.3d 1116, at 1126 (3d Cir. 1997).

Petitioner believes that he is entitled to federal habeas review and relief, as it was state actions that prevented him from filing a timely Post Conviction Relief petition (PCRA) to exhaust his state remedies in accordance with state procedures. Which prevented him from filing his present federal habeas corpus petition on or before April 23, 1997.

In the instant case, petitioner was prepared to file a second Post Collateral Relief petition (PCRA) in the state courts immediately after the Pennsylvania Supreme Court

denied his Allocatur on September 2, 1992, to present his unexhausted and Constitutional claims. But, petitioner was unable to do so because he did not have his legal documents. As a result of the Camphill disturbance on October 25th and 26th of 1989, and the subsequent conduct of the prison officials deliberately destroying all inmates personal possessions, including all legal documents, it impaired petitioner's ability to proceed with filing his second PCRA petition. Petitioner tried to obtain his legal documents by writing to the Clerk of Courts, then Peter Truman. In petitioner's letter to the Clerk of Courts date stamped February 14, 1990, he is clearly explaining to the clerk that all of his legal documents were destroyed after the disturbance at Camphill 1989. See: Exhibit ***A*** enclosed. Still petitioner was unsuccessful in obtaining his legal documents. Petitioner was also a plaintiff in a class action suit filed against the prison officials. See: *Camphill litigation*.

So petitioner contends that his delay in filing his second PCRA petition was the result of government interference, which should have satisfied the state post conviction procedural requirements enumerated in *42 Pa.C.S.A. §9545(b)(1)(i).* So petitioner's petition should not have been dismissed as untimely. Furthermore, because petitioner didn't believe that the amended PCRA legislation was retroactive; specifically section *§9545(b)(1),* he did not feel compelled to immediately file his PCRA petition, especially since he was unprepared to do so, because of the above reasons of not having his legal documents.

Moreover, petitioner was not alone in his lack of knowledge of the amended PCRA legislation retroactive implications, as the PCRA court dismissed the petitioner's petition for what it called a lack of merit, and not for it

being untimely. Please note, Pennsylvania Supreme Court had not rendered a decision on the new PCRA legislation, and *Commonwealth v. Alcorn*, ___ Pa. ___ Super. 703 A.2d 1054 (1997) decision was not rendered by the Superior Court at that time. The decision in *Alcorn* was not rendered until over one year after the petitioner filed his second PCRA petition, and it was then that the Commonwealth asserted this argument in a *letter brief* to the Superior Court that petitioner's PCRA petition was untimely and the PCRA court should not have entertained it.

In *Alcorn*, that court held that in 1995, the General Assembly made modifications to the PCRA to indicate time limits for the litigation of PCRA petitions. More specifically, the amendments bars any petition for post-conviction relief, including a second or subsequent petitions not filed within one year of the date the defendant's judgment of sentence became final. So, the Superior Court subsequently denied the petitioner's appeal as being untimely filed. Petitioner filed a timely application for reargument, and he stated his claim of government interference. See: Application of Reargument enclosed Exhibit ***B***. This application was denied, and petitioner filed a timely allowance of appeal to the Pennsylvania Supreme Court.

Thus, petitioner should have been allowed to present his claims in the state court under *42 Pa.C.S.A. §9545 (b)(1)(i),* which states: "The failure to raise the claim previously was the result of interference by governmental officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States."

Petitioner believes that he has demonstrated that he was prevented from asserting his right to file in an extraordinary way, and that he exercised reasonable diligence in investigating and bring his claims, so he should be entitled to federal review and relief. So, petitioner's first habeas petition should be tolled under provision *§2244 (d)(2).* In our federal system, "the states should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." Citing *Coleman v. Thompson,* 501 U.S. 722, 731, 111 S.Ct. 2546 (1991). Such respect for the states has given rise to the well – established rule that a federal court should not find a states prisoner's claims procedurally barred from federal habeas review unless state law "clearly foreclose[s]" review of the claims." *Touson v. Beyer,* 987 F. 2d 984, 987 (3rd Cir. 1993). Here petitioner's second PCRA petition was properly filed on November 27, 1986, as it was government interference that was the cause for his delay in filing. Petitioner presented this claim to the state courts after he learned that the Superior Court would be adopting the *Alcorn* decision, but this court denied his application for reargument. See: Exhibit ***C.***

Lastly, petitioner pray that this court will consider that when he filed his second PCRA petition, no state or federal case law existed to provide him with proper notice that he would be time-barred from federal review if he attempted to exhaust his state remedies through a second PCRA petition. When petitioner initiated his second PCRA petition on November 27, 1996, the law governing PCRA was *Commonwealth v. Lawson,* 519 Pa. 504, 549 A.2d 107 (1988), and *Commonwealth v. Blackwell,* 384 Pa. Super. 251, 558 A.2d 107 (1989). These courts ruled that a second

PCRA petition is permitted if the petitioner is able to meet one of the enumerated requirements. Because the courts had not reached a decision in *Alcorn* yet, petitioner's petition was governed by *Lawson/Blackwell,* supra., which was the law. Under *Lawson/Blackwell,* petitioners were allowed to bring a second PCRA petitions if they can prove that a miscarriage of justice had occurred that no civilized society could tolerate. As stated above, clearly the PCRA court was guided by these same standards, as this court dismissed the petitioner's petition for what it called a lack of merit, and not because the petition was untimely. Over a year later, and the petitioner was appealing that court's decision, the *Alcorn* ruling was rendered, and the Commonwealth asserted the argument that his second PCRA petition was untimely and should not have been entertained.

How was petitioner expected to know how the new legislation would apply, when learned scholars in the law was not clear on this new 1995 PCRA legislation. In *Lambert v. Blackwell,* 134 F.3d. 506, at 524 (3rd. cir. 1997), that court too was in limbo, as the Third Circuit Court stated: "We note to date, no Pennsylvania court has been asked to decide under what circumstances it would excuse an untimely PCRA petition under the new statute of limitations provision." This court was not confident that petitioners would not be allowed to proceed in the state courts to exhaust their issues without being time barred. This opinion was shared by numerous other Third Circuit Courts, notably *Banks v. Horn,* 126 F.3d.206 (3d. cir. 1997), which found that, even though petitioner had already filed one PCRA petition and that the one-year statute of limitations for filing yet another PCRA petition had run out,

there was a chance that the state courts might nevertheless entertain a second PCRA petition filed by petitioner and address petitioner's three unexhausted claims on the merits. In that case, the Magistrate returned it back to the state court, because there was no absolute statement by the Pennsylvania Supreme Court that an untimely PCRA petition would not be permitted.

It was not until *Commonwealth v. Peterkin*, 722 A2d. 638 (PA. 1998), that the Pennsylvania Supreme Court decided on this matter, and made it clear by denying a PCRA petition as untimely for failing to comply with the one-year statute of limitations. So again, how was a layman *pro se* expected to have a proper interpretation of this 1995 amended legislation without being given fair notice.

Applying the new time limitation retroactively to the instant case would mean that on the effective date of the PCRA, which was January 16, 1996, without prior notice or opportunity to act, the legislature stripped appellant's rights and fair expectations as of February 13, 1996. The problem with the instant PCRA legislation is that, it does not give anyone fair notice. Fair notice certainly implicates due process concerns, and because of a lack of fair notice, it will deprive appellant and others who are similarly situated, due process of law, as well as access to courts. In *Miller v. Florida*, 482 U.S. 423, 107 S.CT 2446, 96 L.ED. 2d. 351 (1987), the United States Supreme Court stated that a law is retrospective if it changes the legal consequences of acts completed before its effective date and that such a law was violative of due process. In the instant case, the new PCRA legislation clearly attaches new legal consequences to events that were already completed before its enactment. Since final judgment was

rendered in appellant's case on March 13, 1986, an event already completed, the new legal consequences is that appellant is now time barred from filing *any* PCRA petition.

Petitioner request that this Honorable Court will grant him federal habeas review and relief.

II. In Any Event, The Petitioner's Petition Provides Basis For Federal Habeas Relief

STATEMENT OF THE CASE

On September 30, 1985, Petitioner who was seventeen years old was arrested and charged with Murder, Robbery, and Possessing an Instrument of Crime (PIC) in the death of Mr. Randolph Baldwin.

On February 13, 1986, petitioner entered a plea of guilty in the Court of Common Pleas of Philadelphia County to the following charges: at 1985 October term 1272 Murder in the second-degree, and at 1985 October 1275 ("PIC"). On this same day, Petitioner was sentenced by Judge David Savitt to life imprisonment for the murder and a concurrent term of one to two years for "PIC".

PROCEDURAL HISTORY

Petitioner did not file a motion to withdraw his plea, or appeal his judgment of sentence. On August 27, 1986, six months later, petitioner filed a *pro se* petition for relief under the Post Conviction Hearing Act 42 Pa. C.S. §§ 9541-9551 (1982) (PCHA), and he was appointed counsel Franklin D. Green, who filed an amend petition

arguing trial counsel ineffectiveness and raised the following claims:

1. Trial counsel was ineffective for failing to seek a suppression of the defendant's statement or confession after he was arrested.

2. Trial counsel was ineffective for failing to explain to the petitioner the effect, full effect of pleading guilty to second degree murder.

A hearing on the Commonwealth's motion to dismiss was held, and an evidentiary hearing was ordered on July 25th, 1988, to take place on November 15, 1988. Counsel Green then withdrew because of personal reasons. So new counsel David Rudenstein was appointed and filed a second amended petition. He filed the following claims:

1. Trial counsel was ineffective for failing to properly present reasons in support of her pre-trial application to this matter to family court.

2. Trial was ineffective for failing to insist that pre-trial motions to suppress defendant's out-of-court statements be held prior to the time any guilty plea was entered.

3. Trial counsel was ineffective for failing to fully explain the ramification of the guilty plea to defendant.

4. The defendant received ineffective assistance of counsel in that defense counsel should have advised defendant not to plead guilty to second degree murder.

An evidentiary hearing was held on March 26, 1991 before Judge James McCrudden, and the petitioner testified that trial counsel advised him to plead guilty to

second degree murder, and that he would only serve 10, 12, or 15 years, but that it was not the end of his life. (N/T, 3/26/91, p. 10). However, on July 23, 1991, petitioner's petition was dismissed and petitioner filed a timely appeal to the Superior Court of Pennsylvania, which affirmed the denial of post-conviction relief on March 30, 1992. Petitioner filed a petition for allowance of appeal to the Pennsylvania Supreme Court, which was denied September 2, 1992.

On November 27, 1996, after trying to obtain his legal documents that were destroyed in the Camphill disturbance, the petitioner filed his second state collateral relief petition under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §9541-9546. Petitioner asserted the following claims:

1. Terms of life imprisonment imposed without a discretionary minimum term for parole eligibility for crimes except first and second degree arson-murder are illegal.

2. Guilty plea colloquy that failed to ensure petitioner understood consequences of plea compels withdrawal of plea.

3. Ineffective assistance of counsel at all levels of representation resulted in denial of due process.

Counsel David Belmont was appointed to represent the petitioner, and he filed a Finley "no-merit" letter to withdraw as counsel. Judge Savitt granted counsel's petition to withdraw and dismissed the petition on July 23, 1997. Petitioner appealed *pro se*, and the Superior Court affirmed the dismissal. Petitioner filed allowance of

appeal to the Pennsylvania Supreme Court, and it was denied on July 29, 1999.

Federal Habeas Petition:

On December 27, 1999, petitioner filed the present *pro se* Petition for Writ of Habeas Corpus. And, raised the following:

a. Petitioner's conviction was obtained by a plea of guilty which was unlawfully induced and was unknowingly and involuntarily entered because he was denied the right to effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution because his attorney advised him to plead guilty to second degree murder when his attorney told him that he would be released after serving 10, 12, or 15 years if he pled guilty to second degree murder which was incorrect because the mandatory sentence was life without parole; and.

b. Petitioner has been denied due process of law, equal protection of the law, being subjected to cruel and unusual punishment in violation of the Sixth, Fourteenth, Eighth Amendment to the Constitution of the United States, terms of life imprisonment imposed without a discretionary minimum term for parole eligibility for crimes except first and second degree arson-murder are illegal.

Standard of Review

A petitioner is only entitled to federal habeas relief if he meets the requirements of Title 28 U.S.C. §2254(d), which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d) (1) and (2).

Discussion

Petitioner first argues that trial counsel was ineffective for failing to inform him that his plea to second degree murder carried a mandatory life imprisonment without the possibility of parole, and for misleading him to believe that he would released after serving 10, 12, or 15 years. [T]he legal standards that apply to claims that an attorney provided constitutionally inadequate legal representation are well-known. To obtain relief, a habeas petitioner must demonstrate "that counsel's performance fell below an

objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). The two-part test articulated in *strickland* applies to claims of ineffective assistance of counsel in the context of guilty pleas. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985), Thus, petitioner is required to established that the advice furnished by counsel was objectively unreasonable and that there is a reasonable probability that his plea decision would have been different had he received accurate information.

In *Meyers v. Gillis*, 93 F.3d 1147, at 1153 (3d Cir. 1996) the Third Circuit Court of Appeals noted that a guilty plea is not involuntary or unintelligent simply because the defendant is not provided with information concerning parole eligibility. However, that Court distinguished between situations in which no parole eligibility information is imparted to a defendant and those in which he is given grossly erroneous advice as to parole eligibility. In the later latter situation, a defendant may be entitled to habeas relief if he can demonstrate that he would have gone to trial if he had received accurate advice from counsel:

> ("several federal appellate courts have suggested or held that, where parole eligility information is provided to a defendant by the state or the defendant's attorney and that information is grossly erroneous, a defendant may be entitled to habeas relief where he can show that he would not have pleaded guilty had accurate information been provided. *See, e.g., Sparks v. Sowders*, 852 F. 2d 882, 885 (6th Cir. 1988). ("This court has decided that erroneous misadvice concerning parole eligibility can amount to ineffective assistance of counsel.") *Meyers v. Gillis*, 142 F.3d 644 (3d Cir. 1998) ("This issue has also been addressed by other circuits which have held or noted that misinformation concerning parole eligibility can be ineffective assistance of counsel. . . . We now hold that gross misadvice concerning parole eligibility can amount to ineffective assistance of counsel."); *Czere v. Butler*, 833 F.2d 59, 63 n.6 (5th Cir. 1987) ("other courts have recognized a distinction between failure to inform and giving misinformation" regarding parole eligibility); *O'Tuel v. Osborne*, 706 F.2d 498, 500-01 (4th Cir. 1983); *Cepulonis v. ponte*, 699 F. 2d 573, 577 (1st Cir. 1983) (defendant need not be informed of the details of parole eligibility but "misinformation may be more vulnerable to constitutional challenge than the mere lack of information"); *Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979) [T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which the defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel.")

93 F.2d at 1153-54; *See also Hawkins v. Murray*, 798 F.Supp. 330, 335 (E.D. Va. 1992) (Equally offensive is the suggestion that a lawyer meets any reasonable standards when he or she fails to advise a defendant that the defendant's plea will result in parole ineligibility and a lengthy period of incarceration")

In this instant case, on February 13, 1986, prior to actually pleading guilty before Judge Savitt, the petitioner was approached by trial counsel Moira Dunworth and he

was advised by her to plead guilty to second-degree murder. Petitioner immediately asked her how much time would he serve, and she informed him that he would only do 10, 12, or 15 years, *but that it was not the end of his life.* Because of the petitioner's age, his parents and brother was approached and advised of this same information, and they advised tell him to plead guilty. Petitioner who had no prior experience of being incarcerated or coming through the legal system, was never told that he would receive a life sentence or that by pleading guilty to second degree murder that he would be ineligible to be released for the rest of his life. Petitioner who was seventeen at the time, would not have plead guilty to spend the remaining of his life in prison had he been told that he would be ineligible for parole. So petitioner appealed immediately after learning that counsel information was grossly inaccurate.

Though trial Judge David Savitt colloquyed the petitioner on February 13, 1986, in regards to the voluntariness of his plea, the petitioner still had an improper understanding of what life imprisonment meant. Petitioner's only understanding of what life imprisonment meant was the information that his trial counsel advised him on prior to his pleading guilty on February 13, 1986. Petitioner testified to exactly what he was told about pleading guilty to second degree murder at an evidentiary hearing held on March 26, 1991, before Judge James McCrudden. He testified to the following:

> "She told me that I would receive ten (10), twelve (12) or fifteen (15) years. That's now much time I would do. It is not like it's the rest of my life. This is what she told she told me." (N/T, 3/26/1991, p.10).

There is nothing in the record to refute the Petitioner's claim that trial counsel did inform him that he would be released after serving 10, 12, or 15 years. However, trial counsel did admit to petitioner's PCRA counsel David Rudenstein, via a telephone call, that she *"did not explain Life was Life without parole simply because she had a very difficult emotional time dealing with such a prospect for the petitioner and his family."* See: Attorney Rudenstein's letter May 21, 1990 as Exhibit ***D***. Attorney Rudenstein had this information available when the evidentiary hearing took place on March 26, 1991, but he failed to call trial counsel as a witness to testify to exactly what she did tell the petitioner in regards to his pleading guilty to second degree murder, and his being released.

After the evidentiary hearing, Judge McCrudden dismissed the petitioner's first PCHA petition for the following reasons:

> "In no less than three (3) instances, defendant was advised that the mandatory sentence for second degree murder is life imprisonment. In each instance, defendant, who stated before this court that he read, writes and understands the English language, advised the sentencing court that he fully understood the impact of the guilty plea and that the plea was voluntary. As the courts of this commonwealth have held, claims directly refuted by the trial court record do not warrant post conviction relief. *Commonwealth v. Cappelli*, 340 Pa. Super. 9, 489 A.2d 813 (1985). See: Court Opinion August 22, 1991.

Please note, the record does not clearly refute the petitioner's claim that he was informed by trial counsel that 'he would only do 10, 12, or 15 years if he plead guilty to second-degree murder, and that it was not the end of his

life.' Rather, the petitioner's exhibit ***D*** contends to confirm his claim that trial counsel advised him on some information regarding parole and his being released. Generally, a habeas petitioner's mistaken belief regarding parole eligibility, alone is insufficient to set aside a guilty plea. *Spinelli v. Collins*, 992 F.2d 559, 562 (5th Cir. 1993). Moreover, a criminal defendant does not need to be advised of "the details of his parole eligibility, including the possibility of being ineligible for parole." *King v. Dutton*, 17 F.3d 151, 154 (6th Cir.), cert. denied, 512 U.S. 1222 (1994). Nonetheless, *information regarding parole provided to a criminal defendant by defense counsel must be accurate. Meyers*, 142 F.3d at 667 n.2. According, a counsel's "gross misadvice" regarding parole eligibility can amount to ineffective assistance of counsel. *Sparks v. Sowders*, supra.

The petitioner who was seventeen, did not know what life imprisonment meant, and when he asked, he was advised that he would only do 10, 12, or 15 years, so he pled guilty under the pretense that he would be released after serving 10 to 15 years. In a Third Circuit Court case involving a state court conviction, the U.S. Court of Appeals held that a guilty plea is only entered voluntarily after proper advice and with *full understanding of the consequences* thereof. *United States Ex Rel Crosby v. Brierly*, 404 F.2d 790 (1968).

Here, petitioner's Sixth Amendment right to effective assistance of counsel was violated because his counsel advice caused him to believe that he would be eligible for parole by pleading guilty to second-degree murder, even though the offense mandated a life sentence without parole. Petitioner relied on this advice from his counsel, but had he known that he would be ineligible for parole, or

that he would spend the remainder of his life in prison, he would not have pled guilty. So when the petitioner asked counsel how much time he would serve, the advice offered by trial counsel was inaccurate and thus was not objectively reasonable within the meaning of *Strickland*. As well, it was not in the petitioner best interest.

The petitioner's decision would have been different if he had been given accurate legal advice as to parole eligibility. *Hill*, 474 U.S. at 60. In considering this issue, petitioner ask the court to be mindful of the fact that "*Strickland v. Washington* does not require certainty or even a preponderance of the evidence that the outcome would have been different with effective assistance of counsel; it requires only a 'reasonable probability' that that is the case." *United States v. Day*, 969 F.2d 39, 45 n.8 (3d Cir. 1992).

The petitioner who was seventeen years old at the time, would not had agreed to spend the remainder of his life in prison if he had known that a guilty plea to second-degree murder mandated such a sentence. Obvious counsel believed that a defense to first and second degree murder existed, as she stated to Judge Savitt the following:

> "Mr. Baldwin apparently said something to my client, such as 'what are you doing?', or something to that effect. My client said, 'What do you mean?'. He said, 'I know what you are up to'; that is Mr. Baldwin.
>
> Mr. Baldwin according to the statement, reached out my client. My client had a blackjack in his pocket.

> He hit Mr. Baldwin with the blackjack, he did not rob Mr. Baldwin. There is certainly an intimation that my client may have contemplated that, at least according to the statements. There were two statements.
>
> My client walked away from Mr. Baldwin and, apparently, there was an officer who was in a patrol car, Officer Little, who witnessed the latter part of the incident.
>
> I think it's significant, Your Honor, that the officer indicated in the statement that he gave subsequent to this, to the arrest of my client for murder, that it looked to him like a fist fight was ensuing, so it's a very ticklish question as to when the intent to rob occurred. [Trial Transcripts at pages 15 and 16].

Yet, counsel Dunworth advised the petitioner to plead guilty to second degree murder. Information was also available that the petitioner was under the influence of alcohol and drugs at the time he committed the offense. Trial Transcripts at page 12. So clearly there were defenses that the petitioner could have pursued, rather than plead guilty to second degree murder to spend the remainder of his life in prison. Petitioner was clearly prejudice by her counsel actions, and would not have plead guilty but for counsel grossly misleading advise.

* * *

Secondly, the petitioner argues that "*terms of life imprisonment imposed without a discretionary minimum term for parole eligibility of crimes except first and second degree arson murder are illegal.*" Thus, in violation of petitioner's Sixth, Fourteenth, and Eighth Amendment

rights. The petitioner contends that he is presently being held under an illegal sentence.

The Honorable Judge Savitt sentenced the petitioner to a term of life imprisonment for second degree murder without an established minimum sentence for parole eligibility. Assuming for the sake of this argument only, that the court properly sentenced the petitioner to life term, in failing to set a minimum sentence the court violated his statutory right to parole eligibility as established by 42 Pa.C.S., §9756(c). That section provides:

> (c) Prohibition of Parole. – Except in the case of murder of the firdt degree, the court may impose a sentence to imprisonment without the right to parole only when:
>
> (1) a summary offense is charged;
>
> (2) sentence is imposed for nonpayment of fines or costs, or, both, in which case the sentence shall specify the number of days to be served; and
>
> (3) the maximum term or terms of imprisonment imposed on one or more indictments to run consecutively or concurrently total less than 30 days.

Because the petitioner was not convicted of first degree murder, and none of the other exceptions within 9756(c) applies in his case, he was entitled under the plain statutory language to have the court set a minimum sentence which, under §9756(c), could not exceed one-half the maximum, thus defining a parole eligibility date. 1 Pa.C.S. §1924. ("Exceptions expressed in statute shall be construed to exclude all others.") As held in *Commonwealth v. Bell,* 512 Pa. 334, 516 A.2d 1172, 1175 (1986),

applying 1 Pa.C.S. §1921(b), when statutory language is clear, the judiciary must read the provisions of a sentencing statute in accordance with plain meaning and usage.

Although §9756(c) is free of ambiguity in and of itself, it must be read in connection with another statute which, on its face, prohibits the Pennsylvania Board of Probation and Parole from exercising its power to release on parole any person serving life imprisonment. That statute, 61 Pa. Stat. section 331.21 provides that:

> The board is hereby authorized to released on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to said board, except convicts condemned to death or serving life imprisonment. . . .

Another statute, 61 Pa. Stat. §331.17, bestows on the parole board the "exclusive power to parole," and does not exclude cases in which the sentence imposed was life imprisonment.

Sections 9756(c) of title 42 and 331.21 of Purdon's Title 61, although codified in different title of the Pennsylvania penal law, are statutes "*in pari materia*" because they "relate to the same persons or things or to the same class of persons or things." 1 Pa.C.S. §1932(a). Such statutes "shall be construed together, if possible, under one statute." *Id.* at (b). Indeed, under this definition all of the statutes within Pennsylvania's Crimes Code which pertain to sentences of life imprisonment are "*in pari materia*" with one another and with the relevant sections of Title 61, and should be read together, in a manner that, "if possible. [gives] effect to all [their] provisions." 1 Pa.C.S. §1921(a).

At first reading 42 Pa.C.S. §9756(c) and 61 Pa.Stat. 331.21 might appear to be in irreconcilable conflict. The former prohibits the court from sentencing a defendant convicted of a degree of murder other than first degree, some of whom, like the petitioner have been convicted of second degree murder and face life sentences, to a non parole eligible sentence; the latter prohibits the parole board from releasing prisoners serving life terms. Clearly there is a problem here, because the petitioner who was sentenced under 18 Pa.C.S. 1102(b) is entitled to the benefits of 19 P.S. Section 1057, which provides any people convicted in any court of this Commonwealth be sentence to a minimum and maximum limit thereof. The only statute which Pennsylvania legislator specified that the terms of life imprisonment for murder shall be without parole, was for certain aggravated types. For example, 18 Pa.C.S. §3301(b) provides that "[a] person convicted of violation the provision of subsection (a)(2) [first degree murder by person committing arson] shall be sentenced to death or life imprisonment *without the right to parole*" the same is provided for arson-murder in the second degree.

So, the Honorable Judge Savitt violated the petitioner's statutory right in failing to set a minimum sentence, and providing the petitioner with a parole eligibility date as established by 42 Pa.C.S. §9756(c). The solution is that the two statutes must be recognized as irreconcilable, and the latter statute should repeal the earlier one. Presently, petitioner's Sixth, Fourteenth and Eighth Amendment rights are being violated.

Petitioner can not stress the importance of a hearing on this Writ of Habeas Corpus petition, where, he has been egregiously deprived of his fundamental right to Due Process and Equal Protection of law. Petitioner believes

that fundamental miscarriage of justice has occurred in this case, and he would really like the opportunity to have this court fully review his claims, and allow him to further present them to this court.

CONCLUSION

Wherefore, the petitioner pray that this court will grant him federal habeas review and relief, and grant the petitioner an evidentiary hearing. What is more, there is a probable cause to issue a certificate of appealability. Lastly, the petitioner request that if this court grant his review, that he be allowed to amend this petition.

Respectfully submitted,

/s/ John A. Pace
John A. Pace, AY6445
P.O. Box 244
Graterford, Pa. 19426

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE **CIVIL ACTION**

V.

NO. 99-6568

DONALD VAUGHN, et al.

RESPONSE TO PETITIONER'S OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

(Filed May 22, 2000)

LYNNE ABRAHAM, District Attorney of Philadelphia County, by **JOHN W. GOLDSBOROUGH,** Assistant District Attorney, and **THOMAS W. DOLGENOS**, Chief, Federal Litigation, on behalf of respondents, respectfully requests that petitioner's objections to the Magistrate Judge's Report and Recommendation be overruled and his petition denied and, in support of this request, states:

In his twenty-seven pages of objections, petitioner, a convicted murderer, makes arguments that were not articulated to the Magistrate Judge.[1] Preliminarily, respondents note that pages 11-27 of petitioner's pleading do not voice objections to the Report and Recommendation but reiterate claims which were made in the petition. The actual objections are contained in the first ten pages only.

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[1] Petitioner first asserted these arguments in his late "Reply to Respondent's Response," which respondents received on May 9, 2000. It bears a certification of service hand-dated May 4, 2000. However, the Magistrate Judge's Report and Recommendation was dated May 1, 2000. Petitioner's late reply was substantially identical to his present objections.

In his objections, petitioner states for the first time that the one-year statute of limitations set forth in 28 U.S.C. § 2244(d), with which he failed to comply, should be deemed equitably tolled in his case. He attempts to set forth several reasons this Court should reject the application of the habeas time bar, but none of these provides a basis for rejecting it.

Outside the context of equitable tolling, petitioner first attempts to demonstrate that his deadline was later than the usual grace period because the state prevented him from filing his habeas petition. He claims, under 28 U.S.C. section 2244(d)(1)(B), that the government created an impediment to his filing, and that therefore the one-year period of limitation for filing his habeas petition did not start to run until that obstacle was removed. Objections at 3-5. Petitioner specifies that his "legal documents" were taken from him as a result of a prison disturbance in October of 1989, and that this prevented him from filing his second PCRA petition until he did. That, in turn, he says, somehow prevented him from filing the present habeas petition in a timely fashion. He neither states when he received his "legal documents," i.e., when the impediment was removed, nor ex-plains why he was unable to file a habeas petition at the same time he filed his second PCRA petition. When this claim is examined more closely, it becomes clear that there is no possible way the deprivation he alleges, even if true, could have prevented him from filing his habeas petition by the date required, April 23, 1997.

Despite claiming he was prevented from doing so until after 1996, petitioner *did* file a petition for PCRA relief with the state courts in 1986, well *before* the alleged 1989 prison riot occurred. Report and Recommendation at 2.

Counsel filed an amended version of this PCRA petition in November of 1989, immediately *after* the prison disturbance to which petitioner refers. Petitioner presumably received a copy of all court documents relating to this PCRA action *after* the 1989 prison riot; therefore, these documents could not have been taken away from him as a result of that earlier disturbance.

In any event, petitioner could have received these documents from counsel. Petitioner was represented by an attorney through his appeal to the Superior Court of the denial of PCRA relief, as a result of which the denial of PCRA relief was affirmed in 1992. He does not explain why he did not obtain a copy of any missing "legal documents," whatever that may mean, from his attorney during those three years after the prison disturbance.

The 1989 prison event clearly had no effect upon petitioner's assertion of claims in the round of PCRA review he began in 1986.

The record demonstrates that, after he received all the opinions and briefs filed during his first PCRA round (i.e., after the state supreme court affirmed the denial of PCRA relief in 1992), petitioner did nothing for four years, until November of 1996, a date some seven months after the one-year "grace period" had begun to run after AEDPA was enacted on April 24, 1996. *Burns v. Morton*, 134 F.3d 109 (3d Cir. 1998). He fails to ex-plain why he did not file a federal habeas petition during these four years. He only asserts that he did not file his second PCRA claim during that time because he lacked his "legal documents," which, as explained above, does not make sense. Petitioner claims that immediately after the state supreme court denied his first PCRA petition in 1992, he "was prepared to file a

second" but "was unable to do so because he did not have his legal documents." Objection at 5. However, for some reason, he *was* able to do so in 1996, and he does not explain what changed to allow him to file in 1996, or how that precluded him from filing a habeas petition by April 23, 1997.

In November of 1996, petitioner chose to file a second state PCRA request. At that time, it is apparent that petitioner felt he had a sufficiently complete collection of "legal documents" to tender such a filing. Thus, on the same date, he could instead have filed a habeas petition – and it would have been deemed timely under the "grace period" provision of *Burns v. Morton,* 134 F.3d 109, 111 (3d Cir. 1998). He could even have filed both a PCRA and a habeas petition at the same time. Rather than taking these safer courses of action, however, he chose to file *only* a second state request for collateral relief, a request he had no right to file under the plain language of the PCRA. Petitioner nowhere asserts that his 1996 choice of whether to file a first habeas petition or a second PCRA petition, or both, had anything to do with the "impediment" he asserts was created in 1989. He just chose incorrectly. But that is not a valid reason for resetting AEDPA's deadline.

Petitioner simply does not qualify for an extended, post-grace-period deadline under section 2244(d)(1)(B) because there was no governmental impediment that prevented him from filing a habeas petition during the "grace period" – which he missed by over two years.

Petitioner further claims statutory tolling is warranted because "the petitioner *didn't believe* that the amended PCRA legislation was retroactive." Objection at 5 (emphasis added). Petitioner's subjective beliefs do not

affect the deadline, and he does not cite authority to the contrary.

Petitioner also states that the state courts should have held that his claim of governmental interference permitted him to file a (very) late PCRA petition under 42 Pa.C.S. § 9545(b)(1)(i). However, he chose not to include that excuse in his second PCRA petition. By petitioner's own statement, he only included it in his application for reargument. Thus, the state courts had no opportunity to rule on this claim, and it is defaulted. Petitioner's attempt to have a federal court re-set his state PCRA filing deadline, which the state courts could not now do, is inappropriate in a federal habeas action.

In his primary objection, petitioner next claims the statute of limitations should be tolled equitably for two reasons: first, he claims that he was in some extraordinary way prevented from asserting his rights, pointing again to the 1989 prison disturbance; second, he argues that he could not have known that the plain-language PCRA time-bar would be applied to him. This bid for equitable tolling falls far short of the mark.

The Third Circuit has recently emphasized that statutes of limitations are subject to equitable tolling only in the narrowest of circumstances. *See Seitzinger v. Reading Hosp. and Medical Ctr.,* 165 F.3d 236, 239-40 (3d Cir. 1999) (courts must be sparing in their use of equitable tolling; "'procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants'"), *citing Baldwin County Welcome Ctr. v. Brown,* 466 U.S. 147, 152 (1984).

Equitable tolling may be appropriate where a petitioner has diligently pursued his federal claims and (1) the respondent has actively misled the petitioner regarding the filing deadline; (2) the petitioner has in some extraordinary way been prevented from asserting his or her rights; or (3) the petitioner has timely filed but in the wrong forum or in a defective way. *Jones v. Morton,* 195 F.3d 153, 159 (3d Cir. 1999); *Miller v. N. J. State Dept. of Corrections,* 145 F.3d 616, 618-19 (3d Cir. 1998); *New Castle County v. Halliburton NUS Corp.,* 111 F.3d 1116, 1125-26 (3d Cir. 1997); *Oshiver v. Levin, Fishbein, Sedran & Berman,* 38 F.3d 1380, 1387 (3d Cir. 1994); *see Irwin v. Dept. of Veterans' Affairs,* 498 U.S. 89, 96 (1990). In contrast, courts will not toll a limitations statute where the tardy filing resulted from a lack of due diligence by the filing party or a mistake or lack of knowledge of the applicable law. *See Irwin, supra; Miller,* 145 F.3d at 619 ("mere excusable neglect is not sufficient"); *New Castle County,* 111 F.3d at 1126; *Wakefield v. Railroad Retirement Bd.,* 131 F.3d 967, 970 (11th Cir. 1997); *Gatewood v. Railroad Retirement Bd.,* 88 F.3d 886, 890 (10th Cir. 1996).

Because petitioner was not reasonably diligent in pursuing his claims, equitable tolling is not warranted.

First, it is important to emphasize that the AEDPA time bar here rests on a question of state law – the applicability of the PCRA filing deadline. Petitioner's tolling argument is simply an attempt to evade the decisions of the state court, which are deserving of deference and respect in a habeas proceeding. Furthermore, the state courts' application of state law could not be more straightforward and predictable in this case. Petitioner filed a second PCRA petition on November 27, 1996. That petition was untimely under a plain reading of the state PCRA

statute, 42 Pa.C.S. § 9545(b)(1), which requires that PCRA petitions be filed within one year of the judgment.[2] None of the statutory exceptions to the PCRA time limit apply to this case;[3] moreover, as this was not petitioner's first petition, the PCRA's "grace period" for new petitions did not apply. *Commonwealth v. Alcorn,* 703 A.2d 1054, 1057 (Pa. Super. 1997).[4] The Pennsylvania Superior Court dismissed petitioner's second PCRA petition as untimely on December 3, 1998, and the Pennsylvania Supreme Court denied *allocatur* on July 29, 1999. Petitioner's second PCRA petition was simply not "properly filed" under 28 U.S.C. § 2244(d) (2), *Lovasz v. Vaughn,* 134 F.3d 146, 148 (3d Cir. 1998). Thus, it had no effect on the April 23, 1997 deadline for filing the habeas petition, as the Magistrate Judge found.

Both *Lovasz, supra,* and *Morris v. Horn,* 187 F.3d 333, 337-38 (3d Cir. 1999), conclude that whether a state collateral relief petition is "properly filed" under AECPA section 2244(d) is a matter of state law. Here, the state court has ruled on that question. It would violate the principles of comity for this Court to determine, through

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[2] **(b) Time for filing petition. –**

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final . . . .

42 Pa.C.S. § 9545(b)(1) (exceptions omitted) (P.L. 1118, No. 32 (Spec. Sess. No. 1, § 1, enacted November 17, 1995; effective 60 days thereafter, i.e., January 16, 1996).

[3] *See Commonwealth v. Pace* (Pa. Super. 1998) (Exhibit A of Response to Petition for Habeas Corpus), slip op. at 5-6.

[4] *See Commonwealth v. Pace* (Pa. Super. 1998) (Exhibit A of Response to Petition for Habeas Corpus), slip op. at 5.

equitable tolling, that the state courts were incorrect on that state question.[5]

Petitioner did not even raise his deprivation-of-legal documents claim in state court, and in any event, it is meritless. As a factual matter, petitioner appears to have had access to necessary documents long before the PCRA deadline passed. Even so, federal courts have been extremely reluctant to find equitable tolling based on such a claim. Lockdowns, lack of access to legal resources, and disturbances are all routine aspects of prison life. A petitioner must take them into consideration in deciding when to file a federal petition, for they "do not constitute extraordinary circumstances sufficient to equitably toll the statute of limitations." *Atkins v. Harris,* 1999 WL 13719 (N.D. Cal. 1999). *See also U.S. v. Ramsey,* 1999 WL 1210827 (E.D. Pa. 1999); *Asquith v. Volunteers of America,* 1 F.Supp.2d 405, 410 (D.N.J. 1998).

It is irrelevant whether the state supreme court had ruled on the 1995 PCRA amendments when he filed his second PCRA petition on November 27, 1996, over a year after those limitations had been enacted. When petitioner filed his second PCRA petition, the statute as amended on November 17, 1995 clearly stated that it was barred. The

[5] Such an approach would be an improper federal intrusion:

> It is not the office of a federal habeas court to determine that a state court made a mistake of state law. *See Estelle v. McGuire,* [502 U.S. 62, 67-68 (1991) (state court's interpretation and application of state law binds federal habeas court)]. . . . If the highest court [of a state] concludes that [a petitioner's] claims have not been raised properly in a state habeas proceeding, that is the end of the matter.

Sweet v. Delo, 125 F.3d 1144, 1151 (8th Cir. 1997).

courts had not yet ruled on the 1995 PCRA amendments, but the statute was clear.[6] Even where there is ambiguity in state law (which there was not here), whether a state petition is "properly filed" under state law is still a matter of state law for the state courts. Since *Lovasz,* the Third Circuit has held:

> We do not yet know how the state court will resolve the second petition. . . . [I]f the state court dismisses [the petitioner's] second PCRA petition for untimeliness, the AEDPA statute of limitations would not have been tolled during its pendency.

Morris v. Horn, 187 F.3d 333, 337-38 (3d Cir. 1999). That is exactly what happened here. The state courts held petitioner's second PCRA to be untimely; as a result, his habeas action was not tolled.

Before he filed it, petitioner was on notice that his second state collateral relief petition would be untimely under the express terms of the statute.[7] He should,

[6] Petitioner cites *Lambert v. Blackwell,* 134 F.3d 506, 524 (1997), not an equitable tolling case, for the contrary proposition. The Third Circuit did state therein that as of December 29, 1997, "no Pennsylvania court has been asked to decide under what circumstances it would excuse an untimely PCRA petition under the new statute of limitations provision." *Id.* (discussing cases excusing filing delay under prior PCRA version). However, as acknowledged by this Court in *Peterson v. Brennan,* NO. 97-3477, 1998 U.S. Dist. LEXIS 12327 (August 11, 1998) at *20, twelve days earlier, on December 17, 1997, the Superior Court of Pennsylvania had construed the statute as written and had upheld the time-bar in *Commonwealth v. Alcorn,* 703 A.2d 1054, 1057 (Pa. Super. 1997). In other words, *Lambert* did not create uncertainty, which if it existed at all, had been resolved by *Alcorn.*

[7] Petitioner cites *Banks v. Horn,* 126 F.3d 206, 214 (3d Cir. 1997), for the contrary proposition. That was not an equitable tolling case, but

(Continued on following page)

therefore, have filed his habeas petition then, during the one-year "grace period" after the public enactment of AEDPA. His failure to file a habeas petition by the April 23, 1997, AEDPA grace-period deadline was, at the very least, a long-shot gamble. There is no reason to reward him for taking this chance.

Petitioner complains that "when he filed his second PCRA petition, no state or federal case law existed to provide him with proper notice that he would be time[-]barred. . . ." Objection at 8. This statement is both irrelevant and mistaken in its premise. There need be no judicial action for there to be a valid notice of a valid law. The clear amendments to the PCRA statute gave him more than adequate notice.

By filing only a second PCRA petition on November of 1996 and not also a federal habeas petition, petitioner speculated that the courts would not apply the plain language of the PCRA amendments straightforwardly. All he complains of today is that they did. The fact that he chose to proceed in this fashion does not constitute an extraordinary circumstance preventing him from filing or misleading him. It does not warrant equitable tolling, because there was nothing unfair about the state court's application of the time-bar.

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a capital case. As such, it presented a special situation, because the Pennsylvania Supreme Court had indicated that it would apply a "relaxed waiver" rule to capital cases; it was unclear whether this "relaxed waiver" would operate to suspend a PCRA time-bar. Eventually, the state courts held that the time-bar would be strictly applied, even in capital cases. In this non-capital case, by contrast, there was never any prospect that a "relaxed waiver" rule would be applied, and petitioner had no reason to believe that his second PCRA petition would be timely or reviewable.

If petitioner's strategy were held to warrant equitable tolling, that would, in effect, be an amendment of 28 U.S.C. § 2244(d)(2). Instead of providing for tolling during while a "properly filed application" is pending, the statute would now provide for tolling while any "arguably proper but actually improper application" is pending.

Additionally, although he is required to do so in order to invoke equitable tolling, petitioner has made no showing that he exercised "reasonable diligence" in presenting his federal habeas claims in a timely fashion. *Jones v. Morton*, 195 F.3d at 160. Again referring to his subjective beliefs as controlling authority, he merely states that he "*believes* that he has demonstrated that he . . . exercised reasonable diligence. . . ." Objection at 7. He nowhere shows, however, that he has. In addition to the discussion above regarding what documents he did and did not have after the supposed prison disturbance, respondents note the passage of *eleven years* since the event he blames for his great delay in bringing this petition. The only event he claims justifies his delay in filing both his PCRA and his habeas petition, a prison disturbance, even if it did occur, was in October of 1989, by his own account. He blames this event for his lack of knowledge of his own case and his late filing of his habeas petition *over* a *decade* later. He attaches *one* letter, dated 1990, in which he requests additional copies of his records. Even if it were admitted that that letter was sent and received and that he had a right to additional copies, which it is not, his letter would still not help him. He remained represented by counsel for another two years after he send that letter. Nowhere does he specify what he was doing in the exercise of reasonable diligence in pursuing his claims even after he wrote the letter. This does not constitute reasonable diligence.

Even if, hypothetically, equitable tolling were somehow to apply to the period when the Pennsylvania courts had not yet ruled upon the amendments to the PCRA, that would still not excuse petitioner's lateness in filing the present habeas petition. The state supreme court promulgated amended rules of criminal procedure in August of 1997 that implemented and reiterated the statutory deadline. Pa.R.Crim.P. 1500 *et seq.*, 42 Pa.C.S. The Superior Court held on December 17, 1997, that the PCRA statutory amendment means what it says. *Alcorn, supra.* The Pennsylvania Supreme Court denied allowance of appeal in *Alcorn* on June 8, 1998. *Commonwealth v. Alcorn,* 555 Pa. 711, 724 A.2d 348 (1998) (Table). Petitioner did not file his habeas petition within a year of any of these dates, but only on December 27, 1999.

Petitioner argues that the PCRA court misled him into thinking the unambiguous statute did not apply, though it said nothing of the sort. Noting that before the Superior Court dismissed it on as time-barred, the PCRA court erroneously dismissed his petition not as time-barred, but as previously litigated and meritless,[8] petitioner claims that the PCRA court's approach misled him into thinking that the time bar did not apply, and that he was somehow vaguely prevented from complying with AEDPA's deadline. But this makes no sense. Even if he was somehow

[8] It is true that the PCRA court found that the single claim raised in petitioner's second PCRA petition was previously litigated and meritless, without reference to the statutory time-bar. Such a finding should support, not detract from, the dismissal of the present petition, however. Moreover, the PCRA court did not find the time-bar inapplicable, nor that the second PCRA petition was timely. Finally, the PCRA court's error of omission was corrected by the Superior Court, which found the petition time-barred.

misled by the PCRA court's decision, in spite of the PCRA's plain language, that does not excuse him from failing to file his habeas petition during the eight months between November of 1996, when he filed his second PCRA, and July of 1997, when the PCRA court ruled. Nor does it excuse him from failing to file in a prompt and reasonably diligent fashion during the twelve months between the time the Superior Court ruled that his second petition was time-barred in December of 1998, and the time he filed his habeas petition, on December 27, 1999. Petitioner's excuse, interpreted generously, covers only the time-period between the PCRA court's ruling and the Superior Court's ruling, a period of one year and five months. This is still not enough to save his habeas petition. His failure to file for habeas relief before and after his alleged confusion prevents any application of equitable tolling.

Whatever uncertainty there may have been about the state time bar was resolved long before petitioner filed his petition. Starting in late 1998, as acknowledged by petitioner, the Pennsylvania Supreme Court made clear in a series of cases that, even in the capital context, the PCRA filing deadline was jurisdictional and would be enforced strictly. This series included *Commonwealth v. Peterkin,* 554 Pa. 547, 722 A.2d 638 (December 21, 1998), *Commonwealth v. Cross,* 555 Pa. 603, 726 A.2d 333 (February 25, 1999), *Commonwealth v. Banks,* 566 Pa. 1, 726 A.2d 374 (March 2, 1999), and *Commonwealth v. Yarris,* 557 Pa. 12, 731 A.2d 581 (May 21, 1999). *See Holman v. Gillis,* 58 F.Supp. 2d 587, 593-95 (E.D.Pa. July 19, 1999).

Petitioner did not file his habeas petition until over a year after *Peterkin* had been decided, and he presents no excuse whatsoever for this final period of delay. No reasonable interpretation of equitable tolling justifies this

extra time. *See New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1126 (3d Cir. 1997); *Fisher v. Johnson*, 174 F.3d 710 (5th Cir. 1999) (no equitable tolling where petitioner waited six months to file habeas petition after end of alleged tolling event). *See also Phillips v. Heine*, 984 F.2d 489, 492 (D.C. Cir. 1993).

Since he has no excuse for his delay, petitioner is not entitled to equitable tolling.

Finally, in addition to the foregoing, the reasons for denying petitioner habeas relief are addressed in the Report and Recommendation itself and in respondents' original response to the Petition for Writ of Habeas Corpus, upon which respondents will additionally rely to support their position that the Report and Recommendation should be adopted and the petition denied.

WHEREFORE, respondents respectfully request that this Court adopt the Magistrate Judge's Report and Recommendation and deny the petition for writ of habeas corpus.

Respectfully. submitted,

/s/ [Illegible]
JOHN W. GOLDSBOROUGH
Assistant District Attorney

/s/ [Illegible]
THOMAS W. DOLGENOS
Assistant District Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE	:	CIVIL ACTION
v.	:	
DONALD VAUGHN, et al.	:	NO. 99-6568

CERTIFICATE OF SERVICE

I, THOMAS W. DOLGENOS, hereby certify that on May 22, 2000, a copy of the foregoing pleading was served by placing same, first class postage prepaid, in the United States Mail addressed to:

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P.O. Box 244
Graterford, PA 19426-0244

/s/ [Illegible]
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE	:	**CIVIL ACTION**
	:	**99-6568**
v.	:	
DONALD VAUGHN, et al.	:	

Memorandum

Giles, C.J. June 7, 2001

Factual and Procedural History

I. Petitioner's Requests for Collateral Relief

On February 13, 1986, Petitioner pled guilty before the Honorable David N. Savitt of the Court of Common Pleas of Philadelphia County to the charges of possession of an instrument of crime and the second-degree murder of Randolph Baldwin. Judge Savitt sentenced Petitioner, who was then seventeen years old, to life imprisonment without the possibility of parole. Petitioner did not file a motion to withdraw his guilty plea, and he did not file a direct appeal.

However, six months later on August 21, 1986, Petitioner filed a pro se petition under the Pennsylvania Post Conviction Hearing Act ["PCHA"], 42 Pa. C.S.A §9541, et seq. Through appointed counsel, Petitioner eventually filed an amended petition claiming both ineffective assistance of trial counsel and trial court error. The Commonwealth moved to dismiss the amended PCHA petition. The PCHA court granted that motion on July 23, 1991. On March 30, 1992, the Superior Court affirmed the PCHA

court's decision. The Supreme Court of Pennsylvania denied Allocatur on September 2, 1992.

On November 27, 1996, Petitioner filed a second request for collateral relief under the Pennsylvania Post Conviction Relief Act ["PCRA"], which replaced the PCHA in 1988. When Petitioner filed the PCRA petition, the Act had recently been amended. The amendments, which were enacted on January 16, 1996, placed new time limits on PCRA petitions. The relevant part of the limitation follows:

> (b) Time for filing petition. –
>
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa. C.S.A. §9545.

II. The Timeliness of the Petitioner's PCRA Petition was Uncertain Based on the Statutory Language and Legislative Note.

Section 9545 of the PCRA states that a petition must be filed within one year of the date that a petitioner's conviction became final, unless the petition falls within one of the enumerated exceptions. At the time Petitioner filed his PCRA petition in November 1996, his conviction had become final over ten years before, and his petition did not claim any of the statutory exceptions to the one year time limit. Since Petitioner's conviction occurred prior to the enactment of the PCRA amendments, it could not have been clear how, if at all, the amendments would apply to the petition when it was filed in November, 1996. The 1995 PCRA amendments had been accompanied by a Note about legislative intent. It stated that "a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition under 42 Pa.C.S. Ch. 95 Subch. B if the petitioner's first petition is filed within one year of the effective date of the act." The Note did not clarify whether petitioners with pre-1996 final convictions, who filed second or successive petitions, but who were filing their first petition since the amendment, had one year after the enactment of the act to file a collateral relief petition.

III. Opinions from Federal District Courts Reflected the Fact that the Timeliness of Petitioner's PCRA Petition was Uncertain when it was Filed.

When Petitioner filed his PCRA petition in November 1996, it was not then known how the Pennsylvania state

courts would apply the above quoted provision. No Pennsylvania state court opinion had been rendered interpreting it. As of September 1997, the third circuit found that it was still not clear how Pennsylvania courts would interpret amendments to the PCRA. Specifically, in *Banks v. Horn*, the court noted that:

> While it is true that the text of the 1995 PCRA amendments supports these contentions [that the 1995 amendments bar a second collateral relief petition filed more than one year after a conviction], it is not clear that these amendments are dispositive. The Commonwealth does not refer us to a single case applying the PCRA as amended in 1995 to support its views. Furthermore, in *Szuchon* and *Beasley* the Pennsylvania Supreme court addresses the merits of claims which seemingly were precluded by the PCRA provisions then in force.

126 F.3d at 214. *Banks* was a death penalty case, and the *Szuchon* and *Beasley* were both death penalty cases. Further, the *Banks* opinion notes that "the Pennsylvania Supreme Court does not apply Pennsylvania procedural bar rules consistently in death penalty cases." 126 F.3d at 213. However, the *Banks* opinion explicitly extends its reasoning beyond death penalty cases. The opinion states:

> It is, of course, possible in death penalty cases (and other cases as well) that future experience will show that the Pennsylvania Supreme Court consistently and regularly applies the 1995 amendments to the PCRA and thereby creates a procedural bar sufficient to satisfy the standard of *Johnson v. Mississippi*. That time, however, has not yet been reached.

126 F.3d 214 n.3. (citation omitted).

Trial courts in this district also noted that the ambiguity of the 1995 PCRA amendments extended to non-capital cases. *See Hammock v. Vaughn,* 1998 WL 163194, at *6 (E.D. Pa. April 7, 1998) ("The possibility exists, therefore, that . . . the statute of limitations bar will be waived by Pennsylvania courts in some cases. There is thus a lack of certainty with respect to state application of this procedural bar . . . "); *Peterson,* 1998 WL 470139, at *6 (E.D. Pa. August 11, 1998) (same).

Eventually, Pennsylvania state courts did interpret the 1995 PCRA amendments and held that the 1995 amendments were jurisdictional and would be adhered to strictly. *See Commonwealth v. Banks,* 726 A.2d 374, 375-76 (Pa. 1999). Further, the 1995 PCRA amendments prohibited all second collateral relief petitions filed more than one year after a conviction became final, regardless of if the first petition was filed prior to the enactment of the 1995 PCRA amendments. *See id.* A recent federal district court case noted that the ambiguity related to the force of the 1995 PCRA amendments has only recently been remedied. *See Holman v. Gillis,* 58 F. Supp. 587, 594-96 (July 21, 1999) ("In light of the mandate by the Pennsylvania Supreme Court . . . since December 1998, the court finds . . . that it can now be said with confidence that the Pennsylvania Supreme Court has consistently and regularly applied the 1995 amendments to the PCRA, namely, the one-year statute of limitations, as a procedural bar to all untimely PCRA petitions that do not qualify for any of the three exceptions.").

IV. Court Proceedings.

Indeed, the uncertainty about the force of the 1995 PCRA amendments extended to Pennsylvania state courts. On June 23, 1997, for example, the PCRA court did not dismiss Petitioner's PCRA petition as time barred. Rather, it denied the petition on its merits. Petitioner appealed.

Seven months after the dismissal of Petitioner's petition, the Superior Court of Pennsylvania issued the first state appellate court decision interpreting the recent amendments to the PCRA. *See Commonwealth v. Alcorn,* 703 A.2d 1054, 1056 (Pa. Sup. Ct. Dec. 17, 1997) ("Our research indicated no prior decisions interpreting this section [42 Pa.C.S. § 9545]; therefore its applicability to this case presents a question of first impression."). The Superior Court in *Alcorn* held that the 1995 amendments to the PCRA disallowed second or successive petitions filed more than one year after the underlying conviction became final, even if the conviction became final, and the first petition was filed, before the enactment of the 1996 amendments. *Alcorn,* 703 A.2d at 1056-57.

The Commonwealth then wrote a letter brief to the Superior Court concerning the pending appeal of Petitioner's PCRA petition. The brief argued that based on *Alcorn* the petition should be dismissed as time-barred. The Superior Court agreed and, on December 4, 1998, dismissed the petition as time-barred. Petitioner requested re-argument of the case, stating for the first time in a motion that prison officials had wrongfully withheld legal documents, and that that conduct entitled him to an exception to the PCRA's new statute of limitations pursuant to 42 Pa. C.S.A. §9545(b)(1)(i). The Superior Court denied his request for re-argument without stating

reasons. Petitioner appealed to the Supreme Court of Pennsylvania. Allocatur was declined by the Supreme Court on July 29, 1999.

On December 27, 1999, petitioner filed the instant federal habeas petition pro se. His petition included claims, among others, that 1) neither his state trial court judge nor his attorney properly informed him that his original life sentence expressly precluded the possibility of parole, and 2) that his sentence was given pursuant to a Pennsylvania statute which was inconsistent with other Pennsylvania statutes, in violation of Due Process Clause of the U.S. Constitution. The petition was referred to United States Magistrate Judge M. Faith Angell for a report and recommendation.

Judge Angell recommended that the petition be dismissed as time-barred because the Antiterrorism and Effective Death Penalty Act ("AEDPA") includes a statute of limitations that requires that habeas petitions be filed within one year of the date that a petitioner's conviction becomes final. *See* 28 U.S.C. §2244(d)(1). Judge Angell accurately noted that petitioners whose convictions became final before the enactment of AEDPA's statute of limitations on April 24, 1996 have until one year from the enactment of the habeas statute of limitations to file their petitions. *See Burns v. Morton,* 134 F.3d 109, 111 (3d Cir 1998). Under this reasoning, Petitioner had only until April 23, 1997 to file his federal habeas petition; his petition had been filed two and a half years after this deadline. Section 2244(d)(2) of Title 28 states that a "properly filed" pending petition for state collateral relief tolls the statute of limitations for federal habeas purposes. Judge Angell reasoned that Petitioner's state collateral

relief petition was not "properly filed," and, thus, did not toll AEDPA's statute of limitations.

The third circuit has determined that a "properly filed" state collateral relief petition is "one submitted according to the state's procedural requirements, such as the rules governing time and place of filing." *Lovasz v. Vaughn,* 134 F.3d 146, 148 (3d Cir. 1998). When Petitioner filed his state court petition, it was unclear as a matter of state law if his state petition would be time-barred. Once the Pennsylvania state courts delineated the new time limits of the PCRA, a Pennsylvania Superior Court dismissed Petitioner's PCRA petition as time-barred. Judge Angell concluded that a petition ultimately dismissed as time-barred by a Pennsylvania appeals court was not "submitted according to the state's procedural requirements" and thus, was not "properly filed" for the purpose of tolling the federal habeas statute. Since Petitioner had no "properly filed" state petition pending since the enactment of AEDPA, Judge Angell recommended that Petitioner's federal habeas petition should be dismissed because it was filed well after the statute of limitations period for filing a federal habeas petition.

Petitioner filed an objection to the Magistrate Judge's report and recommendation claiming that his state court petition should have tolled AEDPA's statute of limitation either because his state court petition was "properly filed" or because this court should apply "equitable tolling" pursuant to the third circuit's opinion in *Miller v. New Jersey Department of Corrections,* 144 F.3d 616 (3d Cir. 1998). The United States responded to Petitioner's Objection. After review of the applicable case law, this court concludes that the petition was "properly filed" for purposes of tolling the federal habeas statute of limitations,

and even if it was not properly filed, Petitioner was entitled to equitable tolling while his state court petition was pending.

Discussion

I. The PCRA Petition was Properly Filed and Tolled AEDPA's Statute of Limitations Because it Abided by all of Pennsylvania's Clear and Well Established Procedural Requirements.

AEDPA's statute of limitation is tolled while a "properly filed" post-collateral relief petition is pending in state court. Last term, the United States Supreme Court defined a "properly filed" petition as follows:

> An application is "filed," as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record. *See, e.g., United States v. Lombardo,* 241 U.S. 73, 76, 36 S.Ct. 508, 60 L.Ed. 897 (1916) ("A paper is filed when it is delivered to the proper official and by him received and filed"); Black's Law Dictionary 642 (7th ed.1999) (defining "file" as "[t]o deliver a legal document to the court clerk or record custodian for placement into the official record"). And an application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. *See, e.g., Habteselassie v. Novak,* 209 F.3d 1208, 1210-1211 (10th Cir. 2000); 199 F.3d, at 121 (case below); *Villegas v. Johnson,* 184 F.3d 467, 469-470 (5th Cir. 1999); *Lovasz v. Vaughn,* 134 F.3d 146, 148 (3d Cir. 1998).

Artuz v. Bennett, 121 S.Ct. 361, 363-64 (2000).

Previously, the third circuit had defined a "properly filed" PCRA petition as follows:

> We believe that "a properly filed application" is one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing. A Pennsylvania PCRA petitioner, for example, must file a motion with the clerk of the court in which he was convicted and sentenced, Pa. R.Crim. P. 1501, generally within one year of the date the judgment becomes final, 42 Pa. Cons.Stat. Ann. § 9545(b) (1). If a petitioner complies with these procedural requirements, or other procedural requirements the state imposes, his petition, even a second or successive petition, is "a properly filed application" for purposes of § 2244(d) (2). While we recognize that the Pennsylvania Supreme Court has announced strict rules regarding the granting of second and subsequent PCRA petitions, *see Commonwealth v. Lawson,* 519 Pa. 504, 549 A.2d 107 (1988), Pennsylvania allows for the filing of second or subsequent PCRA petitions, *see* 42 Pa. Cons.Stat. Ann. § 9545(b)(1), and courts occasionally grant relief in such proceedings, *see e.g., Commonwealth v. Morales,* 701 A.2d 516 (Pa.1997).

Lovasz v. Vaughn, 134 F.3d 146, 148-149 (3d Cir. 1998). Thus, it is now fair to conclude that a PCRA petition is properly filed in Pennsylvania for purposes of tolling AEDPA's statute of limitations when it is delivered and accepted in accordance with applicable Pennsylvania laws

and rules. Petitioner's PCRA petition was delivered and accepted in accordance with applicable Pennsylvania laws and rules. The PCRA court accepted Petitioner's application for filing and ruled on its merits. The fact that state law was subsequently established that resulted in the Superior Court of Pennsylvania dismissing the petition as time-barred does not alter this essential fact.

The United States Supreme Court has listed the types of requisite procedural requirements, among them timeliness, that warrant a state collateral relief petition being considered "properly filed." These include the forms used, the office to which the form is sent, and payment of the relevant filing fee. *See Artuz,* 121 S. Ct. at 364. Similarly, the third circuit has noted that, in addition to the timeliness of the petition, a PCRA petition must be filed with the same court in which the petitioner was sentenced in order to be properly filed. *See Lovasz,* 134 F.3d at 148. These examples show that the "properly filed" requirement is meant to disallow tolling only when state petitions fail to comply with clear and well established procedural requirements. *See Emerson v. Johnson,* 243 F.3d 931, 934 (5th Cir. 2001) ("Although we might have read [the state statute] to prohibit Emerson's suggestion for reconsideration, given Texas case law, as well as the *Artuz* Court's broad reading of the phrase 'properly filed,' we must conclude Emerson 'properly filed' his suggestion for reconsideration."); *Hardy v. Secretary for the Dept. of Corrections,* 246 F.3d 1300, 1302 (11th Cir. 2001) (suggesting "properly filed" under *Artuz* means "conform[ing] with Florida's basic procedural rules"). Therefore, Petitioner's PCRA petition was proper for federal habeas purposes given the state of the law at the time his petition was filed.

II. Third Circuit Precedent Supports Defining a Properly Filed Petition as One that Comports with Clear and Well Established State Procedural Requirements.

The third circuit's interpretation of the term "properly filed" in 28 U.S.C. § 2244(d)(2) requires that state collateral relief petitions that have complied with all clear and established state law procedural requirements toll AEDPA's statute of limitations.

In *Lovasz,* the third circuit stated:

> We have yet to consider what constitutes "a properly filed application" to trigger the tolling mechanism of § 2244(d)(2). Principles of comity inform our decision. In our federal system, "the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." *Coleman v. Thompson,* 501 U.S. 722, 731, 111 S.Ct. 2546, 2555, 115 L.Ed.2d 640 (1991). Such respect for the states has given rise to the well-established rule that a federal court should not find a state prisoner's claims procedurally barred from federal habeas review unless state law "clearly foreclose[s]" review of the claims. *Toulson v. Beyer,* 987 F.2d 984, 987 (3d Cir.1993); *see Banks v. Horn,* 126 F.3d 206, 211 (3d Cir.1997); *Doctor v. Walters,* 96 F.3d 675, 683 (3d Cir.1996). Moreover, in enacting AEDPA, of which § 2244(d) is a part, Congress intended to "reduce federal intrusion into state criminal proceedings." *Banks,* 126 F.3d at 213. Thus, if a state allows petitioners to file second or subsequent petitions for post-conviction relief, federal courts should not undermine the state's decision by refusing to toll the one-year period of limitation of § 2244(d)(1) where a second or subsequent

> petition is pending in the state court system. Nor should we discourage petitioners from exhausting all their claims in state court, even by means of a second or subsequent petition for post-conviction relief where permissible under state law, before seeking habeas review in federal court.

Lovasz, 134 F.3d at 148.

Federal courts must give state courts the first opportunity to correct their alleged errors. Tolling AEDPA's statute of limitations whenever petitioners have complied with all the state courts' clear and established procedural rules squares with the requirement of allowing a state the first opportunity to correct alleged violations of federal rights. A petitioner will be discouraged from filing in state court if it is believed that there is a possibility that the opportunity to bring a federal habeas petition will be lost should the state court end up finding that the state petition is procedurally barred. *See Swartz v. Meyers,* 204 F.3d 417, 419 (3d Cir. 2000); *Hardy,* 243 F.3d at 935.

The third circuit has held that "in the absence of a state court decision indicating that a habeas corpus petitioner is clearly precluded from relief, the district court should dismiss the claim for failure to exhaust even if it is not likely that the state court will consider petitioner's claim on the merits." *Banks v. Horn,* 126 F.3d 206, 211 (3d Cir. 1997). *See also Lines v. Larkins,* 208 F.3d 153, 163 (3d Cir. 2000) (noting petitions should be dismissed for failure to exhaust even it is "unlikely that further state process is available"); *Lambert v. Blackwell,* 134 F.3d 506, 517-18 (3d Cir. 1997). Thus, the third circuit requires that petitioners exhaust in state court whenever a petitioner is not clearly precluded from relief on state procedural grounds, even if

it is very likely, though not certain, that the petition will be dismissed in state court on procedural grounds. It follows that when petitioners file petitions in state court that are not clearly foreclosed by state procedural law, the petitions must be considered properly filed and toll AEDPA's statute of limitations. The third circuit took this position when it determined AEDPA's statute of limitation would toll while the time to file a state appeal of the denial of a PCRA petition was running, even if the petitioner did not file such an appeal. Specifically, the court stated that its decision to toll AEDPA during the time allowed for an appeal of a state court decision

> finds support in the principle of state-remedy exhaustion. In *Mills v. Norris,* 187 F.3d 881 (8th Cir. 1999), the Court of Appeals for the Eighth Circuit applied the principle of exhaustion to a somewhat similar factual scenario. Mills had filed a petition for post-conviction relief before the enactment of AEDPA. On August 15, 1996, the trial court denied his petition. Four days later Mills filed a notice of appeal with the Arkansas Supreme Court, but failed to file the record on appeal within the requisite ninety days as provided by Arkansas' procedural rules. The Arkansas Supreme Court took no action on the appeal. Then, on October 9, 1997, Mills filed a federal habeas petition. The issue before the Eighth Circuit was, in light of Mills' failure to perfect his appeal, on what date did his post-conviction relief motion cease "pending." See *id.* at 882, 884.
>
> Mills argued that the period was tolled until the end of the 90 days to perfect his appeal. The State argued that the appeal was not pending because Mills failed to timely file the record on

appeal as required by the appellate rules. After reviewing the principles of exhaustion and comity, the court concluded:

> In this case, if Mills had filed his federal petition during the ninety days following the filing of his notice to appeal to the Supreme Court of Arkansas, the federal petition would surely have been dismissed for failure to exhaust state remedies, because there was still time to perfect his state appeal by filing the record with the Clerk of the Arkansas Supreme Court. That being so, we conclude the state postconviction appeal was "pending" for purposes of § 2244(d) (2) until at least November 17, 1996, the end of that ninety-day period. Thus, Mills timely filed his federal habeas petition on October 9, 1997.

Id. at 884.

> We find these reasons convincing. If Swartz had attempted to seek federal habeas corpus relief while there was still time to seek allowance of appeal, the petition would automatically be dismissed for failure to exhaust state remedies.

Swartz, 204 F.3d at 422.

Similarly, the Petitioner is entitled to a tolling of AEDPA's statute of limitations since his state petition was filed at a time when a habeas petition, if filed in federal court, would have been dismissed. *See* Part IIIB, infra. Therefore, this court holds that Petitioner's state court petition tolled AEDPA's statute of limitations and that the federal habeas petition must now be considered on its merits.

III. The Statute of Limitations Equitably Tolled While the PCRA Petition was Pending.

A. Equitable Tolling Is Allowed in Extraordinary Circumstance.

Petitioner is also entitled to equitable tolling to the extent that he did not file his federal habeas petition timely. The third circuit has allowed exceptions to AEDPA's one year statute of limitations where strict adherence to the statute of limitations would be unfair. In *Miller v. New Jersey Department of Corrections,* 145 F.3d 616 (1998), the court stated that

> For guidance of the district court, we observe that equitable tolling is proper only when the "principles of equity would make [the] rigid application [of a limitation period] unfair." Generally, this will occur when the petitioner has "in some extraordinary way . . . been prevented from asserting his or her rights." The petitioner must show that he or she "exercised reasonable diligence in investigating and bringing [the] claims." Mere excusable neglect is not sufficient.

145 F.3d at 618-619 (citations omitted) (brackets and ellipses in original). Here, Petitioner exercised reasonable diligence in bringing his claims and it would be unfair, and would rise to an extraordinary deprivation of rights, if under these circumstances he were barred by AEDPA's one year statute of limitations.

B. The Petitioner Would Not Have Been Able to File His Petition in Federal Court in 1996.

The Petitioner would not have been allowed to file a petition in federal court within one year of when AEDPA

was enacted because the federal courts in this district would have refused to hear his federal claims because he had failed to exhaust his remedies in state court. As of September 1997, the third circuit stated that it was still not clear how Pennsylvania courts would interpret amendments to the PCRA and that federal courts should not hear petitions that were not brought in state court simply because they would be thought to be excluded by the 1995 amendments to the PCRA. *See Banks,* 126 F.3d at 211-14. *See also Hammock v. Vaughn,* 1998 WL 163194, at *6 (April 7, 1998) ("There is thus a lack of certainty with respect to state application of [the 1995 PCRA amendments.] This lack of certainty requires dismissal of the petition."); *Peterson,* 1998 WL 470139, at *6 (August 11, 1998) (same). Only recently have the state courts interpreted the 1995 amendments to the PCRA conclusively enough that federal courts do not have to dismiss habeas petitions that seem to be barred by the text of the 1995 amendments. *See Lines v Larkins,* 208 F.3d at 164 (3d Cir. 2000) ("[I]t is now clear that the one year limitation applies to all PCRA petitions including a second petition, no matter when the first was filed."); *Holman v. Gillis,* 58 F.Supp. 587, 594-96 (July 21, 1999).

C. AEDPA's Statute of Limitations Is Tolled Due To Pendency of Petitioner's 1996 PCRA Petition.

It would be patently unfair if the federal statute of limitations ran during the time in which Petitioner was not allowed to bring a federal petition. Accordingly, AEDPA's statute of limitations was equitably tolled while Petitioner's second PCRA petition was pending from November 27, 1996 to July 29, 1999.

Petitioner's sentence was life without the possibility of parole and was imposed when he was only seventeen years old. In applying equitable tolling in a capital case, the third circuit stated, "In a capital case such as this, the consequences of error are terminal, and we therefore pay particular attention to whether principles of 'equity would make rigid application of a limitation period unfair' and whether petitioner has 'exercised reasonable diligence in investigating and bringing [the] claims.'" *Fahy v. Horn,* 240 F.3d 239, 245 (3d Cir. 2001) (citing *Miller,* 145 F.3d at 618). The *Fahy* court went on to state, "We elect to exercise leniency under the facts of this capital case where there is no evidence of abuse of process." *Fahy,* 240 F.3d at 245. Similarly, this case calls for leniency since the consequence facing Petitioner, the certainty of spending age seventeen until his life ends in prison, is extremely grave.[1] Should the court not toll AEDPA's statute of limitations, then Petitioner will have to spend life in prison without being allowed federal review of his claims. *See Fahy,* 240 F.3d at 245. Accordingly, this court finds that extraordinary circumstances exist in this case and that AEDPA's one-year statute of limitations was equitably tolled while Petitioner's PCRA petition was pending.

Conclusion

This court finds that Petitioner was entitled to statutory tolling and equitable tolling while his PCRA petition was pending. Because Petitioner's conviction became final

[1] The Supreme Court has recognized the special gravity of life without the possibility of parole, noting that the sentence "is far more severe" than a life sentence and that only "capital punishment . . . exceeds it." *Solem v. Helm,* 463 U.S. 277, 297 (1983).

before the enactment of AEDPA, he had one year from April 24, 1996, excluding the period in which the statute equitably tolled, to file his federal habeas petition. *See Burns,* 134 F.3d at 111.

The federal statute of limitations ran from April 24, 1996 (the date of the enactment of AEDPA) to November 26, 1996 (the day before petitioner filed his PCRA petition) and from July 30, 1999 (the day after the Pennsylvania Supreme Court declined to review the Pennsylvania Superior Court denial of his PCRA petition) until late December, 1999 when Petitioner filed his federal habeas petition. Given the one year statute of limitations, Petitioner had until December 24, 1999 to file his federal habeas petition. Petitioner dated his federal habeas petition December 22, 1999. The clerk of the court marked Petitioner's petition as filed on December 27, 1999. The prison mailbox rule states that the petition is deemed filed when a prisoner gives his petition to prison officials. *See Burns,* 134 F.3d at 113. Since the Commonwealth does not argue otherwise, this court assumes Petitioner gave his petition to prison officials by December 24, 1999 making his federal habeas petition timely filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE	:	**CIVIL NO.**
	:	**99-6568**
v.	:	
	:	
DONALD VAUGHN, et al.	:	

ORDER

AND NOW, this 7th day of June 2001, upon consideration of Petitioner's objections to the report and recommendation of Magistrate Judge M. Faith Angell, and the Commonwealth's response thereto, it is hereby ORDERED that the report and recommendation is DISAPPROVED. This court will proceed with consideration of the merits of the petition.

BY THE COURT:

_____

JAMES T. GILES, C.J.

copies by fax on
to

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE	:	CIVIL NO.
	:	99-6568
v.	:	
DONALD VAUGHN, et al.	:	

ORDER

AND NOW, this 14th day of June, 2001, it is hereby ORDERED that Billy H. Nolas, Esquire, of the Federal Court Division of the Defender's Association of Philadelphia, is APPOINTED to represent Petitioner in the above matter.

BY THE COURT:

/s/ James T. Giles
JAMES T. GILES, C.J.

copies by fax on
to

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE,	:	CIVIL ACTION NO. 99-6568
Petitioner,	:	
	:	Philadelphia, Pennsylvania
vs.	:	January 29, 2002
DONALD VAUGHN,	:	2:11 o'clock p.m.
Respondent	:	

.....

ORAL ARGUMENT
BEFORE THE HONORABLE JAMES T. GILES
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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Laws Transcription Service

Proceedings recorded by Electronic Sound Recording; transcript provided by computer-aided transcription service.

[2] (The following occurred in open court at 2:11 o'clock p.m.:)

THE COURT: Good afternoon.

ALL: Good afternoon, your Honor.

THE COURT: Please be seated.

Your appearances, please, for the record.

MR. DOLGENOS: Tom Dolgenos, your Honor, from the Philadelphia District Attorney's Office, for the respondents – for the petitioners in the motion for reconsideration. And with me is John Goldsborough also from our office.

THE COURT: Thank you.

MR. NOLAS: On behalf of the petitioner, your Honor, Billy Nolas, responding to the motion for reconsideration.

THE COURT: Thank you.

All right. Where did the Judge go wrong?

MR. DOLGENOS: Your Honor, though it's hard to believe – I'm not sure how you want me to proceed. Should I go to the podium or –

THE COURT: Try the podium. That way, you won't see the daggers in your back.

MR. DOLGENOS: All right. I try to avoid them.

Your Honor, as I can – as I'm sure you know, our position here, despite the volume of briefing, is actually pretty simple, and that is, that this case is controlled by

Fahey, both with respect to statutory tolling and with [3] respect to equitable tolling.

As you know, many of these – counsel from our office and from opposing counsel's office, Mr. Nolas' office, were both involved in *Fahey*, many of these same arguments were raised at that point. And the Third Circuit held specifically, rejected statutory tolling, even in a capital case, where there was more of an argument of uncertain application of the PCRA time bar, and rejected equitable tolling in non-capital cases such as this one.

I'm not sure exactly how your Honor would like me to go through this. What I might do is just –

THE COURT: Start from the top.

MR. DOLGENOS: Okay.

THE COURT: Pretend you have to educate me about this whole matter.

MR. DOLGENOS: What I thought I'd do is I would talk about counter-arguments or possible counter-arguments that your Honor raised in your opinion and that Mr. Nolas raised in his brief, counter-arguments, the applicability of *Fahey*.

Most generally is the uncertainty problem. That is, that the PCRA time bar was uncertain in application because of the possibility that the kind of showing that used to get you back into PCRA Court before the time bar was passed would still be available to overcome the time bar, even after it was passed.

[4] First of all – and I'm not going to spend a lot of time on this – respectfully, from our point of view, it was not uncertain. It was as clear as a bell.

Every single state appellate court to address the time bar has applied it in exactly the same manner, and that manner is exactly in accordance with the way it's written. That is, from January of '96 when the PCRA time bar became effective, state prisoners in Pennsylvania were required or now are required to file their PCRA petitions within one year of the – their judgment became final. For all their convictions, there is a one-year grace period from January of '96 to January of '97 for first petitions. There was no special grace period for second petitions. And all of this came under the jurisdiction and proceedings heading of the statute.

Perhaps we might think, in our own judgment, that this is a draconian statute, to use Mr. Nolas' words, or wrong, or unwise. But it is the statute, it is the law, and it is our position that it was as clear as a bell and that in state court, there really is no, and has been no dispute about that.

With respect to uncertainty in general, let's assume there was some. We – there is no uncertainty exception to the properly filed rule, that is, the tolling provision in the habeas statute.

[5] The idea of uncertainty and its effect on federal habeas proceedings is borrowed from the procedural default context, where you have claims that were found by the state courts to be procedurally defaulted, based on the state procedural rule. Those such rules have to be adequate and independent. One of the tests for adequacy is whether or not the test is certain in application.

The U.S. Supreme Court, in *Artuz v. Bennett,* was very careful to separate the two, that is, the procedural default test applied to claims, on the one hand, and the statute; of limitations test, the tolling test as applied to applications for collateral relief.

If I could make a suggestion, it's that if we're talking about uncertainty, if we think that it indicates a certain matter on unfairness in the proceedings, that's better addressed to equitable tolling rather than statutory tolling. Statutory tolling is just what the statute says. And I submit in the federal habeas statute, there is no provision for uncertainty.

And if you think about it, it gets to be very thorny. If there is an uncertainty exception, what exactly is the test? How uncertain an application does the rule have to be? Is it just a matter of there's a statute that hasn't been applied by a state appellate court? Or even if it is applied, if there's a residual uncertainty that someone can [6] articulate, is that uncertain enough? Is there a diligence requirement? That is, do we require that state prisoners do their best to conform with the most narrow version of this uncertain test, or is it automatic?

Is there – if we find that a rule is uncertain, does that mean necessarily that the petition that was rejected under that rule is properly filed? And who determines uncertainty? Is it the federal courts? If the state court has held specifically that a law is uncertain, is that a matter to be revisited by federal courts? I think it raises some troubling questions if the uncertain test is read into the properly filed part of the habeas statute.

And I think here – the uncertainty test application here raises some troubling issues too. Let me see how I

can say this clearly. The passage – as I understand Mr. Nolas' and Mr. Natale's argument, the passage of the PCRA time bar is essentially meaningless in terms of federal habeas. That is, if state prisoners can think of an exception or think of a reason why it shouldn't apply to them – and I know a creative lawyer like Mr. Nolas will be able to think and has thought of many reasons why it shouldn't be applied – then they don't have to comply with it. They can act, that it – act as if it was never passed. Another way to think about is their legal obligation to act hasn't changed at all.

In federal – that is, in federal habeas, we're [7] looking to what the state law was. And as far as I can tell, in 1993, say, before the time bar was passed, if a state prisoner wanted to file a second or third PCRA and could articulate some miscarriage of justice exception, well, then, that was – he might be able to convince the Court to review the successive petition.

Despite the passage in 1996 of a time bar, which clearly at least raised the suggestion that there would be a time bar problem, he – there is no – as far as I can tell from Mr. Nolas' argument, there is no diligence requirement, there is no requirement that the prisoner – Mr. Pace, in this case – try to avoid the time bar. He doesn't have to try, so long as he has in his mind a reason why it shouldn't apply to him.

And I think ultimately this is borne out of a deep disrespect for the state legislature. Now, we might have our opinions about the state legislature in general about this law in particular, but the fact is it's a law. The fact is it says you have to file your PCRA petitions within one year, and that – and the first petition, you have that grace

period; the second petition, you don't. And I think under any test of – or any rational view of what litigants should do, we should be requiring them to try to comply.

In this case – excuse me, your Honor. I seem to be getting a cold.

[8] THE COURT: Would you like some water?

MR. DOLGENOS: That's okay. I'm fine. Thank you. And I want to talk briefly, if I can, about the petitioner's authority for the alleged uncertainty, because I know that Mr. Nolas, in his brief, in his response to our reconsideration motion, talked a lot about how every court or a lot of courts to address the PCRA time bar have concluded that it was uncertain.

First of all, I want to reiterate my view that the state courts have spoken with one voice on the time bar, and that their uncertainty theory is really something that's been pedaled in federal court. It hasn't been pedaled at all in state court, probably for the good reason that state courts would reject it.

Now, Mr. Nolas does cite a whole bunch of or several cases in which the time bar was applied straightforwardly by the Superior Court. The trial court hadn't applied it. But in all of those cases, I think all of those cases – I don't want to say I'm absolutely sure, but I think in all of those cases, the time bar wasn't raised below.

So what you have there is imperfect people and imperfect courts. It would be nice if every time we walk into a courtroom to litigate a case, everybody raises the important things that need to be raised and everybody

notices that there's a statute of limitations. The fact is it's not [9] going to happen. That doesn't mean the trial courts rejected the time bar. It just wasn't applied.

And then the Superior Court, the error correcting court, reviewed the proceedings and said, well, you know what? You didn't have jurisdiction in the first place. That's not the same as uncertainty, your Honor. That's simply what happens. I mean, I'm sure that there are plenty of examples in federal court in which the time bar hasn't been applied just because people haven't raised it. That stuff happens. It doesn't mean that it's uncertain. It just means that people aren't perfect.

Mr. Nolas also cites a bunch of – some federal cases. A lot of them are capital cases in which at play was the relaxed waiver doctrine, or practice, or rule, in which – which threw an extra monkey wrench into the question of whether or not the PCRA time bar would be applied. And that obviously does not apply here. There's no relaxed waiver for non-capital sentences.

And there are some other courts – federal courts, which, mostly in the exhaustion context couldn't find that state review was clearly foreclosed because of the possibility that the litigant, the prisoner would meet – could meet the exceptions to the time bar in state court. But what that is is sort of the opposite of what we're doing here. What that is is, out of respect for the state courts, [10] let's let them make the decision about whether or not somebody is time barred.

What we're doing here is we have a decision from the state courts. The decision here is that this petition is untimely. The decision here is that the courts had no. jurisdiction. The question is, what do we do with a decision

from the state court? Do we declare it basically meaningless along with the statute, or do we give effect to it? And I submit that under *Fahey,* under *Artuz,* under *Lovage,* under *Nara,* we have to give effect to the state court determination that the petition was untimely.

Well, that's generally my arguments about uncertainty with respect to statutory tolling.

THE COURT: What about equitable tolling?

MR. DOLGENOS: Well, once again, your Honor, *Fahey* controls. The Court in *Fahey* held that uncertainty in the time bar, even with the relaxed waiver rule that exists in capital cases, or existed in capital cases, uncertainty – that kind of uncertainty in the application of the PCRA time bar was not an extraordinary circumstance justifying tolling, even in capital cases. No. Excuse me. I'm mixing up equitable and statutory tolling.

Uncertainty in the time bar is not an extraordinary circumstance, but in capital cases, the court held that you don't need an extraordinary circumstance, that the balance is [11] different. And as I say, there was a better argument in capital cases arising from the existence of the relaxed waiver doctrine.

And what we have to do with respect to equitable tolling is – is talk about two things in non-capital cases.

Number one, the extraordinary circumstance. Was there an extraordinary circumstance that was preventing the prisoner from filing the habeas petition on time? *Fahey* already ruled that a mere uncertainty in the application, that the PCRA time bar is not an extraordinary circumstance.

B, we have to take into account all of the circumstances to see if the petitioner was diligent, and that means looking at the notice that the petitioner had. Well, what's the notice here? It's the statute.

And again, this brings us back to the core question of when the statute is passed, what are the petitioner's obligations? Can the petitioner just ignore it? I would say that that's not the law, and that doesn't get to the core of equitable tolling.

There might be a possibility that the PCRA time bar wouldn't be applied as written, but that doesn't mean that the petitioner didn't have to protect his rights. The question here is whether the petitioner could just not go to federal court, because, well, I have an argument to make, the PCRA time bar doesn't apply to me.

[12] With respect to the opportunities the petitioner had to file a federal petition, well, when the statute was first enacted, he actually could even have filed another state petition, even though it would have ultimately been held untimely. That is, the statute was enacted by the legislature in November of '95, effective 60 days later. So within that 60-day window, he could have filed a second PCRA petition, which – to which the time bar would not have applied. He didn't do that. He waited ten months to file a PCRA, and when he filed the PCRA, he didn't – he didn't mention the time bar.

And I want to emphasize something here. He's not arguing that he was ignorant of the PCRA time bar. It's – that's not enough for equitable tolling. I mean, that's clear. Just mere ignorance of the law is not enough for equitable tolling.

He's arguing, as I understand it, that he was misled by a vague statute, or that the statute was so vague as written that he couldn't – he can't be expected to have known what to do. So he knew about the time bar, but he didn't mention it when he filed the PCRA petition, which means that he was hoping that it wouldn't get raised, or that the Court wouldn't think of it, or – or I'm not sure what, or the Commonwealth wouldn't raise it.

He ultimately did raise – he ultimately did make [13] time bar arguments, but that was only after – as I remember it, it's only after the Superior Court held that it was untimely. In his re-argument petition, he raised arguments as to why his petition shouldn't have been held to be untimely.

In 1997, while his PCRA was pending, when the Superior Court decided *Alcorn* (ph) and *Conway,* and applied the PCRA time bar, he didn't file a habeas petition then either.

In 1998 and 1999, when the Pennsylvania Court specifically characterized the PCRA time bar as jurisdictional, he didn't file a habeas petition then either.

When the Superior Court ultimately rejected his own PCRA as untimely, he filed a re-argument position. He didn't file a protective habeas petition.

When the Pennsylvania Supreme Court denied allocatur, he still waited five months to file a habeas petition.

Taken together, the mere uncertainty in the law – assuming there's uncertainty, the mere uncertainty in the law does not erase the old standard for equitable tolling. The question here is notice, diligence, the circumstances of

the case. And given – and it's our position that when that statute was passed, when the PCRA statute was passed, he had to take steps to protect his federal rights.

[14] That's essentially the crux of our equitable tolling argument.

In your order, your Honor, you talked about the possible inadequacy of the PCRA time bar and whether or not the inadequacy of it should give rise to equitable tolling as I – and as I understand it, that's also borne of the uncertainty problem, too.

I think just the fact that – well, first of all, I don't believe it's inadequate because of many of the same factors that I've talked about before, that as he had notice that it would be applied, he really – he had an opportunity to raise his claims both before that PCRA time bar was passed and immediately afterward. The statute has been applied by the state courts every single time, so I don't think it's inadequate rule.

But more importantly, for purposes of this case, I think adequacy doesn't immediately get you over the equitable tolling test. I think you have to look not at the law itself. I think you have to look at the petitioner's actions, the petitioner's diligence. That's ultimately the equitable tolling test. And again, for the reasons that I talked about before, here, given the traditional standard of diligence, I don't think you can say the petitioner met it.

There are a couple of other problems that were raised in Mr. Nolas' – or arguments that were raised in Mr. [15] Nolas' response to our motion for reconsideration. I'm not sure if your Honor has any questions of me at this point.

THE COURT: Not yet.

MR. DOLGENOS: Why don't I – maybe I should sit down and let Mr. Nolas give you his views, and if I can briefly respond to them.

THE COURT: Thank you.

MR. DOLGENOS: Thank you very much, your Honor.

MR. NOLAS: Your Honor, good afternoon.

THE COURT: Good afternoon.

MR. NOLAS: The issue – issues before the Court strike me as so clear, that I don't know that a lengthy response is necessary. However, as your Honor knows, sometimes I can't help myself, so if I go on too long, you tell me, please.

THE COURT: I will.

MR. NOLAS: Thank you, your Honor.

Just to put it in context, initially, what is before the Court today is not an initial ruling by your Honor, it's a request for reconsideration and a request to certify the issue for purposes of appeal.

I won't belabor the point, but the Commonwealth's burden in those two contexts, it has been characterized as extraordinary, needing to show that your Honor has been clearly erroneous, needing to show that you fundamentally [16] erred, needing to show that a manifest in justice was worked against the Commonwealth, and that a substantial ground with a likelihood of success is to be raised on appeal with respect to the second issue.

THE COURT: Well, it's suggested that I didn't follow *Fahey* with respect to statutory tolling.

MR. NOLAS: Correct, your Honor. And I would submit to your Honor that if your Honor were to rule in the Commonwealth's favor, given Third Circuit law today, then your Honor would be fundamentally erring. And let me tell you why I say that. *Fahey* is not a case that is to be read in isolation as if it is the only pronouncement on point from the Third Circuit.

I can stand here and talk to your Honor for two hours about *Fahey*, what it means, what went on before the Court, what the ramifications were. As your Honor knows, you presided for some time in *Fahey*, as did Judge Shapiro. But I'm not going to do that because the Third Circuit has construed *Fahey* and the United States Supreme Court's opinion in *Artuz*, since the time that *Fahey* was decided, in a manner that undoes the Commonwealth's argument here today.

Specifically, on the question of properly filed and statutory tolling, your Honor posed the question, does *Fahey* preclude statutory tolling? The answer to that question is no, *Fahey* does not preclude a finding of statutory tolling in [17] Mr. Pace's case. We know that because the Third Circuit told us so in the *Nara v. Frank* case. That's at 264 Fed. 3d, 310.

When you put Mr. *Nara*'s case side by side with Mr. Pace's case, and you look at the language of the Third Circuit in *Nara*, the result that your Honor reached as to Mr. Pace's case being properly filed is not even open to dispute, much less so clearly erroneous.

Specifically, *Nara* had filed a PCRA petition in 1996, the same time period that Mr. Pace filed his PCRA petition. Mr. Nara withdrew his PCRA petition in open court.

In 1996, Mr. *Nara* filed a motion to withdraw his guilty plea in open court. The state trial judge rejected that as untimely, holding that that should have been filed ten days after the conviction, and he did not have authority to entertain a motion to withdraw the guilty plea. The case went up to the Superior Court in *Nara*. The Superior Court affirmed.

When Mr. *Nara* filed his federal habeas petition, one of the issues before the Third Circuit was whether the state court motion that Mr. *Nara* filed, construed as a PCRA petition, was properly filed under the United States Supreme Court's opinion in *Artuz* so that it would toll the federal habeas filing deadline.

The Third Circuit in *Nara* found that it was. It found that the test to be applied in these circumstances is [18] whether – is a flexible approach that the federal court should apply, viewing the petition as – through the lens of whether it was properly filed at the time that it was filed, not as the Commonwealth would have it, at some point down the road.

Or to put it another way, as the Third Circuit said in *Lavage*, a petition that is complying with what appears to be state law at the time, and appears to be properly filed, doesn't lose that characteristic because subsequently the state courts rule that it was procedurally barred or that it was subject to some other procedural reason why it would not be considered.

In the *Nara* case, the Third Circuit held that since the state trial court accepted the motion, looked at it and considered it, the same thing as in Mr. Pace's case, since the state trial court allowed counsel and briefing as to the post conviction petition, the same thing as what happened in Mr. Pace's case. And since the state court ruled on the merits of it, in addition to its bar holding, because the state court had said it would not allow Mr. *Nara* to withdraw his guilty plea, that was sufficient to show that the petition was properly filed for purposes of the federal question that your Honor addresses, is something properly filed so as to be sufficient to allow for statutory tolling.

Now, I know there's some language in *Fahey* that says [19] the opposite, but *Nara* came after *Fahey*. *Fahey* did not discuss *Artuz* from the United States Supreme Court. *Fahey* did not talk about it, consider it, apply it.

In *Nara*, the Third Circuit talked about it, considered and applied *Artuz* and found that given those circumstances, the petition is to be deemed properly filed for purposes of statutory tolling.

In Mr. Pace's case, you have a petition filed at a time period when, on its face, it was proper. The state trial court, the PCRA court, accepted it, read it, appointed counsel, asked for briefing, and ruled only on the merits. The state trial court did not say that the case was subject to the one year state statute of limitations.

So when you put *Fahey* here and you look at what the Third Circuit said subsequently in *Nara*, the dicta in *Fahey* that the Commonwealth has relied on for purposes of its statutory tolling argument, is not the Third Circuit's law any longer. The Third Circuit's law on point is *Nara*.

There was a problem, however, in *Nara*, which was that even with all of that, Mr. Nara had still waited more than a year to get his case to federal court. Therefore, even with the properly filed analysis, the Third Circuit found, since he had waited more than a year to get his case to federal court – if he had not waited more than a year – and Mr. Pace didn't wait more than a year, he came to federal [20] court after the ultimate denial from the state courts – but since Mr. Nara had waited after the state courts had denied relief, he would not receive the benefit of statutory tolling.

The Third Circuit then went on to say that they would turn to equitable tolling. And on the equitable tolling, the way that the Third Circuit phrased the question is that federal courts have discretion to apply the principles of equitable tolling when it would be unfair to not apply them. There's no reliance on the *Fahey* – the one sentence in *Fahey* that the Commonwealth has relied on in making its presentation to your Honor.

Your Honor has already made a finding of fact that it would be inherently unfair to Mr. Pace to apply the federal statute of limitations, given the status of state law at the time that he filed his petition. And the status of state law at the time that he filed his petition is also something not to be looked at in isolation.

In *Lambert v. Blackwell,* 134 Fed. 3d, at 506, the Third Circuit explicitly rejected the Commonwealth's current argument that cases such as *Banks* apply only in the capital setting.

The Third Circuit indicated that in capital and non-capital cases, the Pennsylvania courts were willing to look beyond what may be a procedural bar and entertain the

merits [21] when the petitioner alleged, as Mr. Fahey alleged – as Mr. Pace alleged in state court, that all prior counsel were ineffective, that there was a miscarriage of justice, that the sentence was illegal, all those three classically recognized exceptions to procedural default at the time, in 1996, under Pennsylvania law.

What is also significant to consider is what the Commonwealth itself said in *Lambert* to the Third Circuit. In *Lambert,* in 1998, two years after Mr. Pace had filed his PCRA petition, the Commonwealth explained that Pennsylvania law has recognized a miscarriage of justice exception to waiver doctrine under the pre-amendment PCRA. No Pennsylvania case has refused to recognize this exception to waiver as a result of the new amendments.

The district court made a quantum leap in its interpretation of the 1996 amendments to the PCRA as barring any exception to waiver. There is nothing in the legislative history of the 1996 PCRA amendments to support such a conclusion. Pennsylvania case authority would suggest that there exists a miscarriage of justice exception to the waiver doctrine that would enable the Court to review *Lambert's* claims.

So the Commonwealth's own position in *Lambert* in 1996 was that a PCRA petition could be considered on the merits in federal court for a petitioner exactly in the same [22] posture as Mr. Pace. I won't belabor the point. Several district courts have held so. The Third Circuit indicated so in its first *Banks* opinion. And your Honor also knows from our submission that there were several – several state court decisions that did not apply the one-year statute of limitations to petitioners such as Mr. Pace as of the time

which he filed. And that's the time period we're looking at here.

That being said, what becomes even clearer is that *Fahey* should not be looked at in isolation is something that the Third Circuit addressed directly, most recently, in *Banks.* The recent *Tober* 2001 *Banks* opinion is at 271 Fed. 3d, 527.

In *Banks,* the Third Circuit had a situation similar to Mr. Pace's. *Banks* filed for PCRA relief in the Pennsylvania courts in 1997, one year after Mr. Pace. *Banks* argued in federal court against the position that the Commonwealth is taking here, and took in *Banks,* that statutory tolling applied.

The Third Circuit did not hold in *Banks, Fahey* said X, therefore, *Banks* is not subject to statutory tolling. The Third Circuit explained that although technically *Banks'* petition was found barred by the state courts, however, was the petition necessarily therefore not properly filed? While we could explore this concept under Pennsylvania law and the [23] federal habeas statute citing *Artuz,* not *Fahey,* we need not do so because equitable tolling applies.

And I'll take just a couple more moments and go through the four reasons laid out by the Third Circuit as to why equitable tolling applies, because they're dispositive in Mr. *Fahey's* case.

Number one, the Third Circuit held contrary to the Commonwealth's argument that the state of the Pennsylvania law regarding the nature of the filing requirement was unclear at the time that *Banks* filed. The state of Pennsylvania law in 1996 was as unclear for Mr. Pace as it was for Mr. *Banks* in 1997.

Number two, *Banks* could reasonably have viewed the state time limit as a mere statute of limitations subject to equitable tolling, not as the Pennsylvania courts later held, a jurisdictional requirement.

Similarly, Mr. Pace, who filed in 1996, could reasonably have viewed it – and he did reasonably view it, as we know from his filing – not as a jurisdictional requirement, but as a traditional bar that can be overcome in certain circumstances.

Significantly, just one point as an aside. To construe a statute of limitations as jurisdictional is a very strange bird. None of the circuits do that. The United Supreme Court does not hold statute of limitations to be [24] jurisdictional. There's no other state that I know of that construes a statute of limitations to be jurisdictional.

So the one-year filing limit that Pennsylvania imposed, a reasonable – even a studied, learned person looking at it would say, well, it's not jurisdictional, it's subject to exceptions. We know that because the statute says so, and we know that because statutes of limitations generally are not deemed jurisdictional. The Pennsylvania Supreme Court and the Superior Courts subsequently deemed it that way well after Mr. Pace had already filed his petition and was litigating his case.

Banks held that that second factor, that there was no way to know when *Banks'* petition was filed in 1997, what the state courts would rule after it was filed, that second factor indicates that equitable tolling is appropriate. *Banks* affirmed the district court's holding that viewing that situation, what happened in *Banks*, and as we've laid out in our written submissions, a similar thing that

happened in Pace, viewing it as a ruling that would bar federal review would result in the unfair forfeiture of federal review without notice.

The same thing is true for Mr. Pace. It would be – removing federal review without any notice to him in 1996, any reasonable notice when he filed, that the result would be there would be no federal review.

[25] And the Third Circuit directly held in *Banks*, "This provides a basis for us to call on equitable tolling principles in application of our own federal time parameters, the one-year ETBA (ph) requirement."

As to the issue of equitable tolling, *Banks*, the latest pronouncement from the Third Circuit, is directly on point. *Banks* does not accept the analysis under *Fahey* that the Commonwealth is suggesting that your Honor accept, and a ruling in the – what the Commonwealth is seeking is a ruling that would be contrary to *Banks*, contrary to the latest pronouncement from the Third Circuit Court of Appeals.

Now, let me just take a step back. *Fahey* happened early on in this process. *Nara*, *Banks*, Judge Shapiro's recent ruling in the *Rosato* case that we submitted as a supplemental authority, since the decision in *Fahey*, and in light of *Artuz*, there is more directly applicable case law that squarely addresses the issue before your Honor, namely, *Nara* and *Banks*, and disposes both the statutory and the equitable tolling principle in a way that demonstrates that your Honor's holding was completely correct.

And I will add that there's a fifth factor in this case, a case that did not appear in *Banks*, and that is, as your Honor said, and as reason dictates, if Mr. Pace had filed

with you in 1996, your Honor made a finding that you would have dismissed for lack of exhaustion so that he can [26] complete his state court litigation. That was not a factor relied upon in *Banks*. That's an additional factor in Pace that indicates that it's drastically unfair to not apply equitable tolling principles to Mr. Pace.

The Third Circuit directly held so in *Banks*. It said, "It would be unfair to not toll the statute of limitations during the pendency of that state petition up to the highest state reviewing court."

And in rendering that holding, the *Banks* court – and when you look at it, it becomes crystal clear what the Third Circuit intended – the *Banks* court quotes *Fahey* and doesn't say *Fahey* is a special bird that applies only to capital cases. Doesn't say *Fahey* is a case that forecloses this type of relief for non-capital petitioners.

What the Third Circuit said in *Banks* is that the holding of *Fahey* is when it is unfair to apply statutes of limitations in a way that take away federal review from a person such as Mr. *Banks* or such as Mr. Pace, then equitable tolling applies.

So *Fahey* is not to be read in isolation as if it is the only pronouncement. The more recent pronouncements actually construe *Fahey*, apply *Fahey*, and construe it in a way that is totally consistent with your Honor's order, and, in fact, our precedent on point from the Third Circuit supporting your Honor's ruling.

[27] One other point and then, unless your Honor has questions, I'll stop.

When Mr. Pace – as your Honor indicated in your opinion, when Mr. Pace saw that the statute of limitations

was going to be applied against him by the state courts, something that was not done by the trial court, not done in the original briefing in the Superior Court, he submitted that state prison officials had interfered with his access to documents. That is an exception to statutes of limitations recognized by the Third Circuit in cases such as *Miller*, and recognized by the PCRA statute itself, the new one.

Therefore, Mr. Pace's state court submissions were properly filed, even if you didn't have *Banks*, or *Nara*, or *Fahey*, even if you had simply *Artuz*, simply what the Supreme Court said is the definition of properly filed, and that is, that somebody attempts to comply with state law as it is at the time of filing.

Then the question isn't, did the state courts later say it's procedurally barred, or meritless, or frivolous, or we won't even look at? The question is, was it accepted and was it reviewed? Mr. Pace's petition was sufficient to be accepted and reviewed under the law as it was in 1996, and even under the law as it is today, as the Commonwealth would have it, because he cited that exception.

Therefore, under – no matter how you slice it, the [28] bottom line is that your Honor was not clearly erroneous. You were not fundamentally wrong in your ruling. To the contrary, your ruling is in compliance with Third Circuit law, in compliance with United States Supreme Court law, *Artuz*, and in compliance with several district court decisions. I won't go through them in detail. Your Honor has them in writing.

The bottom line then becomes, in response to both of your Honor's questions, the answers are very straightforward. *Fahey* does not preclude statutory tolling.

And number two, given that your Honor found that state law was unclear at the time that Mr. Pace filed his petition in 1996, the same finding the Third Circuit made in *Banks*, given that there was no adequate and independent straight ground in 1996, the same finding that the Third Circuit made in *Banks*, and given that the state court applied the new bar retroactively, the same finding that the Third Circuit made in *Banks*, equitable tolling applies to Mr. Pace, as does statutory tolling. Equitable tolling, the Third Circuit said so in *Banks; Nara* from the Third Circuit, statutory tolling also applies to Mr. Pace.

Mr. Pace has alleged that his guilty plea resulted from remarkable ineffective assistance of counsel that gave him – a lawyer who gave him materially inaccurate advice as to the plea, rendering it involuntary.

[29] There is Third Circuit case law on point, *Myers v. Gillis*, for example. I won't rattle them off today. It's not the right time for it. But there's Third Circuit case law on point that says that that's not only a colorable claim, but that, if given an opportunity, Mr. Pace can obtain relief under federal law.

Mr. Pace was 17 at the time of the guilty plea. Mr. Pace is serving life without parole, as your Honor noted in your order, the second most serious sentence known to law. Mr. Pace should not have the opportunity to present his case to your Honor, foreclosed on the thin threat that the Commonwealth has provided to your Honor, especially given the Third Circuit's case law since *Fahey* that shows that your Honor was eminently correct.

THE COURT: Would these proceedings be advanced if this matter – if this issue was certified to the Third Circuit?

MR. NOLAS: I can't see how they would be advanced. They would be delayed by the two years that it would take the case to go up and come back down.

First, that advancing the litigation is something that the Commonwealth has to convince your Honor here, but just normally convince any tribunal that there's a substantial likelihood of success in the appeal. There's no substantial likelihood of success in the appeal when the [30] Third Circuit has already decided the statutory tolling issue in *Nara*, and the equitable tolling issue in *Banks* in a way that is consistent with your Honor's order.

Now, we could go up, we could brief it, I'll get up there and argue it, Mr. Dolgenos will get up there and argue it. When your Honor looks at *Banks* and *Nara* and lays them side by side with this case, is there any conceivable way that you can say there is a strong likelihood that the Third Circuit will say, we won't apply this precedent to Mr. Pace? And there's no strong likelihood of that. Does the Commonwealth have an argument? Sure, they have an argument. Is it an argument that is a strong likelihood of success? Not when the Third Circuit on point has ruled in Mr. Pace's favor already.

Secondly, the Commonwealth is not put in a more difficult position. These arguments that they've been presenting to your Honor, they can preserve, they can raise them on appeal after there is a determination from the Court as to the merits of Mr. Pace's claims.

So the Commonwealth is not hurt, and I don't see how it advances the ultimate result to have us go up, when the likelihood is we're just going to come right back down and be where we are today, with us asking for the opportunity to actually present the merits of Mr. Pace's case.

THE COURT: Thank you.

[31] MR. NOLAS: Thank you very much, your Honor.

THE COURT: Mr. Dolgenos.

MR. DOLGENOS: Thank you, your Honor.

Just very briefly. As I understand Mr. Nolas – well, he said two things about *Fahey*. One is that the pronouncements in *Fahey* on which we're relying are dicta. I don't think they're dicta. I think that's just a matter of reading the case. I think it's pretty clear that *Fahey* meant what it said.

The other theory is that *Fahey* was somehow overruled by *Artuz*, by *Nara*. And I think there is no way to read these cases in such a way as to hold that *Fahey* has been overruled.

Let me first talk about *Artuz*. The holding in *Artuz*, this Court specifically said – specifically reiterated the holding that the Third Circuit made in *Fahey*, which is that the properly filed test in the habeas statute of limitations ultimately turns upon the state's procedural requirements for filing a collateral petition, including the timeliness of the petition. That's exactly what *Fahey* says. That's exactly what *Artuz* says. That's exactly what *Lovage* says. That's exactly what *Nara* says.

The only issue that's open – and it's explicitly left open in *Artuz* – is whether or not if there are exceptions to the statute of limitations and the state prisoner attempts to meet those exceptions, that that could [32] transform an improperly filed petition into a properly filed petition. But

Artuz also explains why ultimately that argument should be rejected.

The Court in *Artuz* gave the example of filing a collateral petition with a clerk in state court, and the clerk accepts the petition, and ultimately, the petition is found to be untimely. The Court made it clear that what that does is it shows that the petition was pending, but not properly filed. Ultimately, if the state courts find that it was untimely, it was pending, but not properly filed. And thus, the Court gave meaning to all of the language in the habeas statute, the properly filed test, as well as the pending test. So that question remains open.

THE COURT: But what if a trial judge considers and disposes of the petition on its merits?

MR. DOLGENOS: Do you mean in the alternative or just –

THE COURT: I mean, does that satisfy the properly filed petition standards under *Artuz*?

MR. DOLGENOS: No –

THE COURT: Not a clerk, but the order's been filed with the Prothonotary's Office, and the trial judge considers the petition and acts on it on the merits.

MR. DOLGENOS: No, your Honor, it would not be properly filed if the state court ultimately found that the [33] trial court had not – did not have jurisdiction to act on the petition.

THE COURT: Well, is jurisdictional the same as properly filed?

MR. DOLGENOS: No, it doesn't have to be. But here in Pennsylvania, because the time bar has been found to be jurisdictional, what this Court would have to hold –

THE COURT: Well, what was determined?

MR. DOLGENOS: When – when was –

THE COURT: That was said in 1999.

MR. DOLGENOS: Well, it's my position, of course, that it's clear from the statute that it's jurisdictional, but – and no one ever said it wasn't jurisdictional –

THE COURT: If it were jurisdictional, why did the Supreme Court have to decide if it's jurisdictional?

MR. DOLGENOS: Well, the Supreme Court said it was jurisdictional, but that doesn't mean that there was ever much question in the state courts, it would be found to be jurisdiction.

But putting that aside for a moment, say there was question. In, I believe – I did a little bit of research on this this morning, and I found a case in the Superior Court. I think it was *Perry – Commonwealth v. Perry,* which mentioned that it was – that the PCRA time bar was jurisdictional in 1998. And then you have that spate of [34] cases that the Court is aware of, in 1999, *Peterkin,* et cetera, which held squarely that it was jurisdictional.

If I could just address *Nara* for a second. I disagree with the way Mr. Nolas talked about *Nara. Nara* involved – it was not a PCRA petition at all. *Nara* filed a third PCRA petition, which was timely, by the way. And the Court suggested that he withdraw it and file a motion to withdraw his guilty plea, nunc pro tunc, which he did. And then the Court looked at that and rejected it.

It didn't reject the nunc pro tunc motion as untimely. That's not what you do with nunc pro tunc motions. You just – you address them to find out whether or not they meet the standards for nunc pro tunc motions. And there's no question that the Court had jurisdiction in *Nara* to consider this motion to withdraw the guilty plea nunc pro nunc.

The difference between this case, or a case where there's an untimely PCRA, and *Nara,* is in this case, the Court did not have jurisdiction. That's what the appellate – state appellate court said. The Court did not have jurisdiction to decide this PCRA.

THE COURT: Well, is that what the Pennsylvania Supreme Court said?

MR. DOLGENOS: In this case, no, your Honor, the Superior Court.

THE COURT: What did it say?

[35] MR. DOLGENOS: The Court said that it was untimely. You know, offhand, I don't know if the Court said specifically that it was without jurisdiction. But that's what all the other cases say. It's – in fact, I believe it did, actually, say that the Court was without jurisdiction to entertain it. I'm 90 percent sure.

It's my position that that wouldn't really matter if the Court didn't say that. I mean if the Court says it's untimely – and other courts say untimely means you have no jurisdiction – then that's a jurisdictional finding.

Nara did not overrule *Fahey*. And neither did *Artuz*, which, after all, held that an untimely collateral petition is not properly filed.

With respect to *Banks*, *Banks* was a capital case. It held exactly the same way as *Fahey* found. That is, you have in a capital case, the extra concern of relaxed waiver. In that case, the Court saw that there was – in its view, there was an exaggerated uncertainty, and because of that, they granted equitable tolling. That's pretty much the result that *Fahey* reached. It may be a little bit different in the way it approached the issue, but it didn't overrule *Fahey*.

THE COURT: Well, aren't you concerned about judicial legislation, that there could be a relaxed waiver rule for capital cases and not for life imprisonment? I mean what's the rationale?

[36] MR. DOLGENOS: For relaxed waiver or for not having it in life cases?

THE COURT: Yes.

MR. DOLGENOS: Relaxed waiver is purely a creature of the Pennsylvania Supreme Court. And it was created back in 1982 – I think it's *Zettlemoyer* (ph) – *Commonwealth v. Zettlemoyer*, for the express purpose that limited relaxation of waiver rules is the phrase – for the express purpose of making sure that prisoners who are condemned to death get review of their claims before they're executed. In a life case, the Pennsylvania Supreme Court has never applied relaxed waiver because there is no imminent threat of execution.

THE COURT: There is an imminent threat to the person in prison. But unless there is review, the person will be in prison for the rest of his life.

MR. DOLGENOS: But that's not an act by the – the denial of review is not an act of the state, as it would be if a person is executed before he gets review. If someone misses a deadline, that's not ultimately the responsibility of the state courts, o long as there is the opportunity for review. And remember that Mr. Pace did, in fact, have –

THE COURT: Well, the person's liberty is dead.

MR. DOLGENOS: Well, there's no doubt that Mr. Pace received an extraordinarily serious sentence for an [37] extraordinary brutal beating of a man to death on Market Street. We might disagree about whether or not that's an appropriate sentence, but – and I don't mean to minimize it. I think it would be far more troubling if the federal courts were to engraft a relaxed – essentially, a relaxed waiver provision onto a class of cases that the Pennsylvania Supreme Court has not done so.

THE COURT: Well, so are you citing *Fahey* for the holding – for the proposition that there could be equitable tolling in capital cases and not in non-capital cases, or are you suggesting that this Court should follow state law? Did *Fahey* come up with that, or was it preexisting?

MR. DOLGENOS: *Fahey* said specifically that death is different, and that it would – because death is different, the Court in *Fahey* required less than an extraordinary circumstance to justify equitable tolling.

THE COURT: Am I bound by that conclusion of the Third Circuit –

MR. DOLGENOS: Yes.

THE COURT: – that death is different?

MR. DOLGENOS: Yes, your Honor, I believe you are. I don't mean to say that you couldn't in a life case ever find equitable tolling. But what I'm saying is that you couldn't, for the same reasons that were presented in *Fahey* accept equitable tolling in a live case, when the Court in [38] *Fahey* explicitly said that it's – that that would not meet the standards for equitable tolling in a non-capital case.

THE COURT: And that still remains good after *Artuz*?

MR. DOLGENOS: I believe so, your Honor. I believe so. If I could just –

THE COURT: Isn't *Artuz* a kind of leveling the playing field case? I mean it's – if it's properly filed, as we've defined it, it is properly filed and that's the end of it. Isn't that what *Artuz* says? Let's not get into this discussion about who's more important, the person who's going to die through execution, or the person who's going to die through life imprisonment.

MR. DOLGENOS: I think that it's true that *Artuz* made no distinction between the two, but *Artuz's* holding was that an untimely petition is not properly filed, as well as a petition that is timely but that is rejected on the merits or for procedural reasons specific to each claim, like waiver. That's properly filed. But a timeliness holding, a holding that something is untimely, *Artuz* says, is not properly filed. It's sort of the same thing that *Lovage* held, which is the Third Circuit's case that came out a couple years before. It's the same distinction that *Lovage* made.

If I could just end, your Honor, if you have no further questions for me, with sort of a plea to – if your Honor sees fit to grant statutory or equitable tolling in [39] this case – I think what we have here is an extraordinary situation where we have a large number of petitioners who filed their PCRA petitions between 1996. And as I understand your Honor's question, 1999 would be the operative end date for your analysis or for Mr. Nolas' analysis, because that's when the jurisdictional issue was cleared up. That's three and a half, four years. That's a long time. A lot of petitioners filed their petitions during that time. Up to now, we – the district courts have been holding in lock step that if the state courts ultimately found that the PCRA petition was untimely, then it was not properly filed. And so a lot of these petitions have already been dismissed as untimely.

If Mr. Nolas is right –

THE COURT: How many were dismissed after *Artuz*?

MR. DOLGENOS: I would have to check, your Honor. I believe so. I don't – I'm a little baffled as to how *Artuz* could have changed the rule when *Artuz* says that untimely petitions are not properly filed.

But in any event –

THE COURT: Well –

MR. DOLGENOS: In any event, your Honor, it's an issue that, if Mr. Nolas is right, the Third Circuit has overruled itself with a panel opinion sub silentio. That is, by not mentioning *Fahey*, not saying that *Artuz* overruled [40] *Fahey*, and when we come to work in the morning, and

we're responding to these petitions, we need to have some more certainty.

And I think everyone, including the prisoners, needs to know whether or not an untimely petition is properly filed or not. And so because it's an extraordinarily important issue, and because often an issue like this evades review, because it often happens if we lose on the tolling issue, we'll win on the merits, so often, these don't – these issues don't go up, I think it's important for this one to go up.

THE COURT: Don't you want to win on the merits?

MR. DOLGENOS: I would like to win on the merits. I would not like – I would rather not get to the merits if we don't have to.

THE COURT: Okay.

MR. DOLGENOS: Thank you, your Honor.

THE COURT: Thank you. Mr. Nolas, do you have anything else?

MR. NOLAS: I have some reiteration, your Honor, but I don't know if I want to trouble you with it, so I'll just stop, unless your Honor has questions, of course.

THE COURT: No, I don't have any questions. I will consider your arguments and make a decision.

MR. NOLAS: Thank you, your Honor.

[41] MR. DOLGENOS: Thank you, your Honor.

THE COURT: Thank you all very much.

(Proceeding concluded at 3:09 o'clock p.m.)

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CERTIFICATION

I hereby certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Geraldine C. Laws — 10/12/04
Geraldine C. Laws, CET — Date
Laws Transcription Service

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE,	:	CIVIL ACTION
Petitioner,	:	99-6568
	:	
v.	:	
	:	
DONALD VAUGHN, et al.,	:	
Respondent	:	

MEMORANDUM

Giles, C.J. March 29, 2002

I. Introduction

John A. Pace ("Mr. Pace"), a state prisoner who pled guilty to second-degree murder and possession of an instrument of crime, petitions for a writ of *habeas corpus* under 28 U.S.C. § 2254. This court had referred Mr. Pace's petition to United States Magistrate Judge M. Faith Angell for a Report and Recommendation. She recommended that the petition be dismissed as time-barred because the Antiterrorism and Effective Death Penalty Act ("AEDPA") includes a statute of limitations that requires that federal *habeas* petitions be filed within one year of the date that a petitioner's conviction becomes final in state court. *See* 28 U.S.C. §2244(d)(1). The Recommendation accurately noted that petitioners whose convictions became final before the enactment of AEDPA's statute of limitations on April 24, 1996, have one year from that date to file their petitions. *See Burns v. Morton,* 134 F.3d 109, 111 (3d Cir 1998). It concluded that a petition ultimately dismissed as time-barred by a Pennsylvania appeals court was not submitted according to the state's procedural requirements, and thus, was not "properly filed" for purposes of tolling the federal *habeas* statute. (Report and

Recommendation at 7.) The Recommendation reasoned that petitioner had only until April 23, 1997 to file his federal *habeas* petition. This § 2254 petition was filed by December 24, 1999 and was, therefore, seen as time-barred.

Petitioner filed objections to the Report and Recommendation claiming that his second state court petition, pursuant to the Pennsylvania Collateral Relief Act ("PCRA"), should have tolled AEDPA's statute of limitations either because his state court petition was "properly filed" or because this court should apply "equitable tolling" pursuant to the third circuit's opinion in *Miller v. New Jersey Dept of Corrs.,* 145 F.3d 616 (3d Cir. 1998). The Commonwealth of Pennsylvania responded, opposing the objections. In *Pace v. Vaughn,* 151 F. Supp.2d 586, 591 (ED. Pa. 2001), this court held that Mr. Pace's state court petition was "properly filed" for purposes of tolling the federal *habeas* statute of limitations, and that, even if it had not been "properly filed," petitioner was entitled to equitable tolling while his second state court PCRA petition was pending.

On June 22, 2001, the respondents moved for reconsideration or permission to appeal. Oral argument was heard on January 29, 2002. For the following reasons, the motion for reconsideration is denied and the motion for permission to appeal is granted.

II. Background

A. *State Court Proceedings*

On February 13, 1986, petitioner pled guilty before the Honorable David N. Savitt of the Court of Common Pleas of Philadelphia County to the charges of possession

of an instrument of crime and the second-degree murder of Randolph Baldwin. Petitioner, who was then seventeen years old, was sentenced to life imprisonment without the possibility of parole. Petitioner did not file a motion to withdraw the guilty plea and he did not file a direct appeal.

Six months later on August 21, 1986 petitioner filed a *pro se* petition under the Pennsylvania Post Conviction Hearing Act ("PCHA"), 42 PA. CONS. STAT. ANN. § 9541, *et seq*. Through appointed counsel, petitioner eventually filed an amended petition claiming both trial court error and ineffective assistance of trial counsel. The Commonwealth moved to dismiss the amended PCHA petition. The PCHA court granted that motion on July 23, 1991. On March 30, 1992, the Superior Court affirmed the PCHA court's decision. The Supreme Court of Pennsylvania denied Allocatur on September 2, 1992.

The PCHA was replaced by the PCRA in 1988. The PCRA was amended in 1995 and those amendments became effective on January 16, 1996. Act of Nov. 17, 1995, P.L. 1118 No. 32 (Spec. Sess. No.1), § 1.

On November 27, 1996, petitioner filed a second *pro se* application for collateral relief under the PCRA. The PCRA court appointed counsel and allowed petitioner to amend his application. Mr. Pace's second application alleged that: (1) the imposition of a life sentence without eligibility for parole was illegal; (2) the guilty plea was entered involuntarily; and (3) all counsel were ineffective, resulting in a denial of due process. (§ 2254 Pet. at 5-5A.) On July 23, 1997, the PCRA court denied the petition on its merits. Petitioner appealed to the Superior Court of Pennsylvania.

While petitioner's appeal was pending, the Superior Court decided *Commonwealth v. Alcorn*, 703 A.2d 1054, 1057 (Pa. Sup. Ct. Dec. 17, 1997). It held, for the first time, that the 1995 amendments to the PCRA disallowed second or successive petitions filed more than one year after an underlying conviction became final, even if the conviction became final and the first petition was filed before the enactment of the 1996 amendments. *Alcorn*, 703 A.2d at 1056 (finding that "our research has indicated no prior decisions . . . interpreting this section [9545(b)]; therefore, its applicability to this case presents a question of first impression").

The Commonwealth wrote a letter brief to the Superior Court concerning the pending appeal of the denial of Mr. Pace's second PCRA petition. It argued that based on *Alcorn* the petition was time-barred. The Superior Court agreed and, on December 3, 1998, it dismissed the petition as time-barred.

By motion, petitioner requested re-argument, contending there for the first time that prison officials had wrongfully destroyed legal documents, and that that conduct entitled him to an exception to the PCRA's new statute of limitations, pursuant to 42 PA. CONS. STAT. ANN. §9545(b)(1)(i) ("the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim . . . "). (Pet.'s Objs. to Magis. Rep. and Recommendation, Ex B, App. for Re-argument at 3.) On February 8, 1999, without stating reasons, the Superior Court denied the request for re-argument. Petitioner appealed to the Supreme Court of Pennsylvania. Allocatur was denied on July 29, 1999.

B. Federal Proceedings

On December 24, 1999, petitioner filed this federal *habeas* petition, *pro se*. In it, he claimed that 1) neither his state trial court judge nor his attorney properly informed him that his original life sentence expressly precluded the possibility of parole, and 2) his sentence was meted out pursuant to a Pennsylvania statute which was inconsistent with other Pennsylvania statutes, in violation of the Due Process Clause of the United States Constitution. (§ 2254 Pet. at 8.)

As discussed *supra* Magistrate Judge Angell recommended that the § 2254 petition be dismissed as time-barred. This court declined to follow the Report and Recommendation and, in an opinion dated June 7, 2001, found that Mr. Pace's petition was "properly filed" for purposes of tolling the federal *habeas* statute of limitations and that, even if it had not been properly filed, petitioner was entitled to equitable tolling while his second PCRA petition was pending.

Respondents filed a motion for reconsideration on the grounds that this court's holding is directly contrary to *Fahy v. Horn*, 240 F.3d 239 (3d Cir. 2000), which, they argue, is binding authority as to both the statutory and equitable tolling issues raised by Mr. Pace. (Resps.' Pet. at 2.) Since the June 7, 2001 order and opinion in *Pace*, there have been relevant circuit case law developments on the issue of whether a state PCRA petition, ultimately declared untimely by the state's highest court, may be "properly filed" for purposes of the federal *habeas* statute. Also, the third circuit has rendered decisions which clarify that court's position on equitable tolling. Nevertheless, while this court denies the respondents' motion for reconsideration, it

grants permission for an immediate appeal because there are important legal questions involved which perhaps should most appropriately be answered by the third circuit at this stage of the proceedings.

III. Discussion

A. Standard for a Motion for Reconsideration and for Interlocutory Appeal

1. Motion for Reconsideration

Reconsideration of a judicial ruling is appropriate if (1) there has been an intervening change in controlling law; (2) there is new evidence not previously available; or (3) there is a need to correct a clear error of law or fact or to prevent a manifest injustice. *Public Interest Research Group of New Jersey Inc. v. Magnesium Elektron Inc.*, 123 F.3d 111, 116-117 (3d Cir. 1997).

2. Interlocutory Appeal

The appropriate standard for an order granting permission for an interlocutory appeal is whether (1) the order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

B. Mr. Pace's Second PCRA Petition Statutorily Tolled AEDPA 's Statute of Limitations

1. AEDPA's Statute of Limitations

A state prisoner must file his or her federal *habeas corpus* petition within one year after the completion of the

state court proceedings. 28 U.S.C. § 2244(d)(1). The following section became effective on April 24, 1996, when the Antiterrorism and Effective Death Penalty Act of 1996 was signed into law:

> Title 28 U.S.C. § 2244(d) provides in relevant part:
>
> (d)(1) A 1-year period of limitation shall apply to an application for a writ of *habeas corpus* by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; . . .
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection. 28 U.S.C. § 2244(d).

AEDPA's statute of limitations is subject to statutory and equitable tolling. *Miller,* 145 F.3d at 618. In addition, the third circuit has held that it would be impermissibly retroactive to "bar the filing of a *habeas* petition before April 23, 1997, where the prisoner's conviction became final before April 24, 1996 . . ." *Burns,* 134 F.3d at 111. Mr. Pace's conviction became final in 1986. He had one year from the enactment of AEDPA, plus any additional time, for which he can show statutory or equitable tolling is appropriate, within which to file a federal *habeas* petition.

2. Pennsylvania's PCRA Statute

When petitioner filed his second PCRA petition on November 27, 1996, the Pennsylvania collateral relief statute had recently been amended. The amendments placed new time limits on PCRA petitions. The relevant part of the amended limitation subsection reads:

> (b) Time for filing petition. –
>
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively. 42 PA. CONS. STAT. ANN. § 9545.

The 1995 PCRA amendments were accompanied by a Note concerning legislative intent. The Note stated that "a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a

timely petition under [42 PA. CONS. STAT. ANN. § 9545(b)] if the petitioner's first petition is filed within one year of the effective date of the act." Sec. 3(1) of Act 1995 (Spec. Sess. No. 1), Nov. 17, P.L. 1118, No. 32. On its face, § 9545(b) of the PCRA states that a petition must be filed within one year of the date that a petitioner's conviction becomes final, unless the petition falls within one of its enumerated exceptions, or the petitioner's conviction became final before the effective date of the amendments and the petitioner is filing a first application.

3. Pace's Second PCRA Petition was "Properly Filed" Under Federal Law

The Supreme Court held in *Artuz v. Bennett,* that a state *habeas* petition is "properly filed" for purposes of § 2244(d)(2) and statutorily tolls the federal *habeas* statute

> when its delivery and acceptance are in compliance with the applicable laws and rules governing filing. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. 531 U.S. 4, 8 (2000) (quoting *Lovasz v. Vaughn,* 134 F.3d 146, 148 (3d Cir. 1998)).

"[T]he question whether an application has been 'properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." *Artuz* 531 U.S. at 9. *Artuz* distinguishes between state statutes or statutory provisions which set forth "a condition to filing" as opposed to "a condition to obtaining relief." *Id.* at 11.

However, *Artuz* specifically left open the question "whether the existence of certain exceptions to a 'timely' filing requirement in a state collateral relief statute can prevent a late application from being considered 'improperly' filed" for federal *habeas* purposes. *Id.* at 9 n.2. Although the third circuit has not directly answered this question, other circuits which have decided the issue have found that "if a state's rule governing the timely commencement of state post conviction relief petitions contains exceptions that require a state court to examine the merits of a petition before it is dismissed, the petition, even if untimely, should be regarded as 'properly filed.'" Such a statute "does not impose an absolute bar to filing" and is a "condition to obtaining relief" rather than a "condition to filing." *Dictado v. Ducharme,* 244 F.3d 724, 728-29 (9th Cir. 2001); *Smith v. Ward,* 209 F.3d 383, 384-85 (5th Cir. 2000) (holding that a petition is "properly filed," even if eventually dismissed as untimely, when the state statute governing timely filings contains certain exceptions which require some level of judicial review); *but see Brooks v. Walls,* No. CIV.A.01-1584, 2002 WL 126606, at *2 (7th Cir. Feb. 2, 2002) (holding that a "plain error exception" to a state statute's timely filing requirement does not prevent a late application from being "improperly" filed for federal *habeas* purposes).[1]

[1] Pennsylvania's PCRA statute differs materially from the Illinois PCRA statute which the seventh circuit treats as a procedural filing requirement even though Illinois state court judges "cast at least a sidelong glance at the merits in order to determine whether to excuse failure to meet the deadline." *Brooks,* 2002 WL 126606, at *1. The Illinois PCRA statute states in relevant part:

> (c) No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave

(Continued on following page)

Current third circuit precedent is entirely consistent with the approach that the ninth and fifth circuits have employed. In *Nara v. Franks*, the third circuit discussed the flexible approach that it has adopted in determining whether a state collateral petition is "properly filed" for purposes of § 2244(d)(2) and statutorily tolls AEDPA. *See Nara v. Frank*, 264 F.3d 310, 315 (3d Cir. 2001). In

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to appeal or the date for filing such a petition if none is filed or more than 45 days after the defendant files his or her brief in the appeal of the sentence before the Illinois Supreme Court (or more than 45 days after the deadline for the filing of the defendant's brief with the Illinois Supreme Court if no brief is filed) or 3 years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. 725 L. COMP. STAT. 5/122-1(c).

The seventh circuit found that the Illinois statute lacks the merits-related exceptions that the [AEDPA] applies to federal courts." *Brooks* 2002 WL 126606, at *3. Instead, an Illinois state court may excuse a late filing if the petition demonstrates "plain error." *Id.* Conversely, the "merits-related" exceptions to the timeliness requirement in Pennsylvania's PCRA statute are virtually identical to those contained in the AEDPA. *Compare* 42 PA. CONS. STAT. ANN. § 9545(b)(1)(i)-(iii) *with* 28 U.S.C. 2244(d)(1)(B)-(D).

The seventh circuit described the approach of Illinois trial judges in evaluating untimely PCRA petitions as follows: "Thus any state prisoner whose delay was not caused by his own 'culpable negligence' (which forecloses any consideration of an untimely filing) receives either plenary review or a judicial response along the lines of 'this petition is late; and because it does not demonstrate a miscarriage of justice, I have decided not to excuse the untimeliness.'" *Brooks*, 2002 WL, 126606, at *1.

Although the seventh circuit has characterized its review as "non-merits based," it is respectfully suggested that as th[illegible] "sidelong glance at the merits" is meant to be meaningful and not a frivolous judicial exercise, it is a "merits-based" review system. The merits are considered, however cursorily, with a deliberate eye trained to determine if the untimeliness of the petition should be excused to avoid a miscarriage of justice in a particular case.

determining that petitioner Nara's state post-conviction petition was properly filed for purposes of federal law, it applied the distinction discussed in *Artuz* between whether a state collateral petition meets the "conditions for filing" as contrasted to an inquiry as to whether the claims in the petition meet all of the "conditions for obtaining relief" under state law. *Id.*[2]

Nara is consistent with its earlier decision in *Lovasz* which held that the question of whether a state court petition is "properly filed" does not depend upon the state court's ultimate ruling on the merits of the application. *Nara*, 264 F.3d at 315 (quoting *Lovasz*, 134 F.3d at 149 (a meritless PCRA petition can still constitute a "properly filed application" under § 2244(d))). *Lovasz* found that if a state allows petitioners to file second or successive petitions for post-conviction relief, federal courts should not undermine the state's decision by refusing to toll the one year period of limitation of § 2244(d)(1) while a second or successive petition is pending in the state court system. *Lovasz* stated that "[w]hile we recognize that the Pennsylvania Supreme Court has announced strict rules regarding the granting of second and subsequent petitions, Pennsylvania allows for the filing of second or subsequent PCRA petitions, and courts occasionally grant relief in such proceedings.(citations omitted)" *Lovasz*, 134 F.3d at 148-149.

As discussed above, § 9545(b)(1) of the PCRA statute sets forth strict rules or conditions for obtaining relief

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[2] Petitioner Nara had filed a motion to withdraw a guilty plea nunc pro tunc which the third circuit noted is akin to an application for state post-conviction or other collateral review. *Id.* at 316.

under Pennsylvania law. However, this statute is not an absolute bar to filing a second or successive petition more than one year after a conviction became final. The statute contains exceptions that require "some level of judicial review" to examine the merits of the petition before it can be dismissed as time-barred. At the very least, a state court must examine a PCRA petition to determine whether the petition alleges any of the enumerated exceptions to the one year time-limit: (i) that the failure to raise the claim previously was the result of interference by a government official; (ii) that the facts upon which the claim is predicated were unknown to the petitioner, or (iii) that the right asserted is a newly recognized and retroactive constitutional right. 42 PA. CONS. STAT. ANN. § 9545(b)(1).

Therefore, this court sees § 9545(b)(1) of the PCRA statute, as imposing conditions for obtaining relief and not as an absolute bar to filing a petition. *See* ***Rosado v. Vaughn*, No. CIV.A.00-5808, 2001 WL 1667575, at *3 (E.D. Pa. Dec. 28, 2001) (finding that § 9545(b) "discourages late PCRA petitions by strictly limiting the availability of relief, but, given its exceptions, it does not impose an absolute bar to filing a late application: it is not a procedural filing requirement."); *Cooper v. Vaughn*, No. CIV.A.00-6016, 2001 WL 1382492, at *3 (E.D. Pa. Nov. 6, 2001) (same).** Mr. Pace's second PCRA petition was untimely under Pennsylvania law in that it was too late for him to obtain relief under Pennsylvania law, yet, the PCRA petition was "properly filed" for purposes of federal law and tolled AEDPA's statute of limitations since it complied with the relevant factors set forth in *Lovasz*. 134 F.3d at 148.

4. Fahy Does Not Preclude a Finding That Pace's Second PCRA Petition Was Properly Filed

Respondents argue that *Fahy* controls the issue and requires a finding that Mr. Pace's second PCRA petition was not "properly filed." (Resp.'s Mot. at 2.) However, in a decision after *Fahy*, the third circuit specifically declined to reach the issue of whether a second PCRA petition, clearly untimely under Pennsylvania law, was necessarily not "properly filed" under § 2244(d)(2) for federal purposes. *See Banks v. Horn*, 271 F.3d 527, 534 (3d Cir. 2001) [*Banks IV*][3]. The third circuit stated:

> [w]hile we could explore this concept [whether an untimely state petition is necessarily not properly filed] under the applicable Pennsylvania law and under the federal *habeas* case law, *Artuz*, we need not do so, because we conclude that, even were we to decide that the late filing of Banks's second PCRA rendered it not 'properly filed,' the District Court appropriately called on equitable principles to toll the one-year AEDPA requirement given this unusual fact pattern.(citations omitted) *Id.*

Fahy does not control an issue which the third circuit recognized had not been decided as of October 31, 2001, the date of the *Banks IV* decision.

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[3] There are numerous relevant and important opinions in the various *Banks* proceedings. While we designate the opinions for purposes of this opinion, they are not consistent with how other courts have numbered the various decisions. *Banks v. Horn*, 126 F.3d 206 (3d Cir. 1997) [*Banks I*]; *Banks v. Horn*, 63 F. Supp.2d 525 (M.D. Pa. 1999) [*Banks II*]; *Commonwealth v. Banks*, 726 A.2d 374 (Pa. 1999) [*Banks III*]; *Banks v. Horn*, 271 F.3d 527 (3d Cir. 2001) [*Banks IV*].

Respondents further contend that *Fahy* stands for the proposition that an untimely PCRA petition cannot be "properly filed" under federal law. (Resps.' Mot. at 10.) Actually what *Fahy* holds is that a federal court, in determining whether a state PCRA petition was "properly filed," must interpret state law as it does when sitting in a diversity case and must defer to a state's highest court when it rules on an issue. 240 F.3d at 243-244. The *Fahy* panel observed that the Pennsylvania Supreme Court had specifically ruled that *Fahy's* petition *was not properly filed as a matter of state law* and that that determination by the highest state court was binding on a federal court. *Id.*

For factual and legal reasons, *Fahy* does not apply to the matter at hand. Factually, this case is materially different from *Fahy*. Here, there has not been a similar determination by Pennsylvania's highest court that Mr. Pace's second PCRA petition was improperly filed as a matter of state law. Here, the PCRA court did not dismiss Mr. Pace's second PCRA petition as time-barred when it was filed on November 27, 1996. Here, the PCRA court appointed counsel to represent Mr. Pace, gave appointed counsel an opportunity to amend the petition, and on July 23, 1997, denied the petition *on its merits*. Petitioner timely appealed to the Superior Court. While the appeal was pending, the Commonwealth sent a letter brief to the Superior Court arguing that Mr. Pace's petition should be dismissed as time-barred, based on *Alcorn*. In seeking reconsideration of the court's rejection of his petition as time-barred, petitioner made a new factual claim that squarely came within one of the exceptions to the PCRA's new statute of limitations. The Superior Court denied

petitioner's request for re-argument *without stating reasons.*

The court acknowledges the argument that Mr. Pace waived his right to raise the governmental interference exception to the PCRA statute of limitations raised to the superior court because he did not make that allegation initially when he filed his second PCRA petition. 42 PA. CONS. STAT. ANN. § 9544(b) (Resp. to Petitioner's Objs. to R & R at 5.). However, given that the Pennsylvania Supreme Court had previously allowed merits review of technically defaulted claims, *see Commonwealth v. Lawson*, 549 A.2d 107, 111-112 (Pa. 1988), Mr. Pace had a good faith basis in believing that that court would review this technically waived issue, which had fundamental constitutional dimensions.

It is noticed that while *Fahy* was filed (Feb. 9, 2001) after the Supreme Court's decision in *Artuz*, (Nov. 7, 2000), the third circuit did not cite to that decision or attempt to reconcile it to the facts and circumstances of *Fahy*. Notably, subsequently, *Nara*, the most recent third circuit opinion on the issue of statutory tolling (Aug. 30, 2001), did cite and follow *Artuz*. Therefore, as a matter of precedent, *Nara*, not *Fahy*, controls disposition of this case.

Further, the *Fahy* panel relied on a ninth circuit case, *Dictado v. Ducharme*, 189 F.3d 889 (9th Cir. 1999) [*Dictado I*] which was subsequently reversed by *Dictado v. Ducharme*, 244 F.3d 724 (9th Cir. 2001) [*Dictado II*]. The ninth circuit reversed to make *Dictado I* consistent with *Artuz*. The third circuit had cited the *Dictado I* opinion for its language: "Had Congress intended to toll the statute of limitations for the period during which even improper

applications were pending in state court, it would not have included the 'properly filed' limitation." *Fahy,* 240 F.3d at 243 (quoting *Dictado I,* 189 F.3d 889, 892 (9th Cir. 1999)). This is the very language that the ninth circuit decided to disavow in light of *Artuz*. *Dictado I* was withdrawn after *Artuz* distinguished between state statutes which are "conditions to filing" as opposed to state statutes which are "conditions to obtaining relief," and left open the question whether the existence of certain exceptions to a timely filing requirement can prevent a late state post collateral petition from being considered "improperly filed." *Dictado II,* 244 F.3d 724, 727 (2001) (quoting *Artuz,* 531 U.S. at 9 n.2). That is precisely the question now at issue in this case.

In *Dictado II,* the ninth circuit held that 'if a state's rule governing the timely commencement of state post conviction relief petitions contains exceptions that require a state court to examine the merits of a petition before it is dismissed, the petition, even if untimely, should be regarded as "properly filed." *Id.* at 727-28. Had the third circuit panel relied on *Dictado II,* an opinion consistent with *Artuz* the panel might have reached a conclusion consistent with *Dictado II.*

C. *Pace's Second PCRA Petition Equitably Tolled AEDPA's Statute of Limitations*

1. *Standard For Equitable Tolling*

The one year "period of limitation" under 28 U.S.C. § 2244(d)(1) to file a federal *habeas corpus* petition is a statute of limitations subject to equitable tolling. See *Miller,* 145 F.3d at 618. The *Miller* opinion explained that

the one year federal *habeas* statute of limitations can be equitably tolled

> only when the principle of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not sufficient."

Id. at 618.

The *Fahy* panel enumerated three circumstances which permit equitable tolling: "(1) if the defendant has actively misled the plaintiff; (2) if the plaintiff has in some extraordinary way been prevented from asserting his rights; or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum." *Fahy,* 240 F.3d at 244 (quoting *Jones v. Morton,* 195 F.3d 153, 159 (3d Cir. 1999)).

2. *Mr. Pace Has Been Prevented From Asserting His Federal Rights in an Extraordinary Way*

The recent third circuit decision, *Banks IV,* is instructive for determining whether Mr. Pace has in some extraordinary way been prevented from asserting his rights. *See Banks IV,* 271 F.3d at 534. There, the court approved the district court's reasons for equitably tolling the federal statute of limitations: (1) "the state of Pennsylvania law regarding the nature of the filing requirement [42 PA. CONS. STAT. ANN. § 9545(b)] was unclear, and Banks could reasonably have viewed the state limit as a mere statute of limitations subject to equitable tolling, not, as the Pennsylvania Supreme Court, later

held . . . , a jurisdictional requirement" and (2) viewing the Pennsylvania Supreme Court ruling as a bar to filing a federal *habeas* petition "would result in unfair forfeiture [of petitioner's federal rights] without notice." *Id.* at 534. The court found that these factors provide "a basis for us to call on equitable principles in application of our own federal time parameters – the one year AEDPA requirement." *Id.* These fairness factors are replicated here.

a. The Uncertain Nature of the PCRA Filing Requirement

i. Statutory Language and Legislative Note

When Mr. Pace filed his PCRA petition in November 1996, it was not known how Pennsylvania courts would interpret the amendments to the PCRA statute that had become effective on January 16, 1996 and had placed a new one year time-limit on PCRA petitions. From the language of the statute itself, it is not clear that the time-limit is jurisdictional.

The *Banks II* district court decision held that while § 9545 is captioned "[j]urisdiction and proceedings," it is not clear from the statute that all of the subsections involve jurisdiction[4] or that subsection (b), stating the one year time-limit and the exceptions to it, was intended to be jurisdictional in nature. *See Banks v. Horn,* 63 F. Supp.2d

[4] Subsection (a) states that original jurisdiction is in the Court of Common Pleas. Section (c) limits the jurisdiction of the state courts to issue a stay of execution. Section (d) states standards governing admissibility of evidence, discovery, and privilege during and relating to an evidentiary hearing. 42 PA. CONS. STAT. ANN. § 9545. Discovery and privilege are normally not considered jurisdictional matters. *Banks II,* 63 F.Supp.2d at 533.

525, 532-33 (M.D. Pa. 1999) [*Banks II*]. The limitations subsection (b) states that a petition "shall be filed within one year of the date the judgment becomes final . . . " with certain exceptions. The subsection does not use "standard jurisdictional language" that "no court will have the authority to entertain an untimely petition." *Id.* at 534. The district court in *Banks II* concluded that "it cannot be said that § 9545(b) is necessarily jurisdictional in nature, as opposed to a statute of limitations subject to equitable tolling." *Id.* This court, like the third circuit in *Banks IV,* 271 F.3d at 534, finds the reasoning of the district court in *Banks II* persuasive and determinative.

Since Mr. Pace's conviction occurred prior to the enactment of the PCRA amendments, it also could not have been clear how, if at all, the amendments would apply to his second PCRA petition which was filed in November, 1996. The 1995 PCRA amendments had been accompanied by a Note regarding legislative intent. The Note stated that "a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition under [42 PA. CONS. STAT. ANN. § 9545(b)] if the petitioner's first petition is filed within one year of the effective date of the act." Section 3(1) of Act 1995 (Spec. Sess. No. 1), Nov., 17, P.L. 1118, No. 32. The Note did not clarify whether petitioners with pre-1996 final convictions, who filed second or successive petitions, but who were filing their first petition since the amendments, had one year after its enactment within which to file a collateral relief petition.

ii. Relaxed Waiver Practice of Pennsylvania State Courts

Although Mr. Pace's case is not a death penalty case, the general practice of Pennsylvania's state courts to provide merits review to technically defaulted claims in death penalty cases ("the relaxed waiver doctrine") increased the uncertainty of the PCRA one year time-limit during the period when Mr. Pace had to decide whether to file for collateral relief in state or federal court. State courts allowed merits review for claims barred by the statutory time-limit of the amended PCRA for capital, *and in some instances non-capital cases,* if the claims alleged (1) the failure to raise the claim earlier was caused by ineffective assistance of counsel, or (2) the failure to address the merits of the claim could result in a miscarriage of justice. ***See Commonwealth v. Albrecht,* 720 A.2d 693, 700 (Pa. 1998) (a PCRA petitioner's waiver will only be excused upon a demonstration of ineffectiveness of counsel in waiving the issue and only in a capital case); *but see Commonwealth v. Beasley,* 678 A.2d 773, 777 (Pa. 1996) (stating that generally a second or successive post-conviction request for relief will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred but this showing is not required in a capital case). *Beasley* was decided on June 18, 1996, five months after the PCRA time-bar went into effect.**

The third circuit itself has determined that it was not clear until *Commonwealth v. Banks,* 726 A.2d 374, 375-76 (Pa. Mar. 2, 1999) [*Banks III*] that the state PCRA statute of limitations was jurisdictional and not waivable, and

that Pennsylvania state courts would discontinue the long held practice of allowing merits review for claims barred by the PCRA time-bar. *See Fahy* 240 F.3d at 245. Further, the third circuit has found that the uncertainty in the application of the relaxed waiver rule extended beyond capital cases. The third circuit stated that as of January 16, 1998, it was not clear that Pennsylvania's courts would bar merits review of a PCRA petition in a non-capital case even if that petition were untimely under the PCRA's statutory time-bar and did not meet any of the enumerated exceptions. *See Lambert v. Blackwell,* 134 F.3d 506, 521 & n.26 (3d Cu. 1998) (" . . . Pennsylvania courts have expressed a willingness to depart from the PCRA's stringent waiver standards, for non-capital, as well as capital cases . . ."). In 1997 the third circuit stated that "it is, of course, possible in death penalty cases (and other cases as well) that future experience will show that the Pennsylvania Supreme Court consistently and regularly applies the 1995 amendments to the PCRA and thereby creates a procedural bar sufficient to satisfy the standard of *Johnson v. Mississipi.* That time, however, has not yet been reached." *Banks v. Horn,* 126 F.3d 206, 214 n.3 (3d Cir. 1997) [*Banks I*].

b. Treating Mr. Pace's Second PCRA Petition As Untimely And a Bar to Filing a Federal Habeas Petition Would Result in Unfair Forfeiture Without Notice

It was not until the Pennsylvania Supreme Court decided *Banks III* in 1999 that it was sufficiently clear for federal review purposes that § 9545(b)(1) was jurisdictional and could operate as a bar to federal *habeas* review. *Fahy,* 240 F.3d at 245; *Banks IV,* 271 F.3d at 534. In *Banks*

IV, the court noted that viewing the Pennsylvania Supreme Court's 1999 decision as a jurisdictional bar to a petitioner filing a pre-1999 federal *habeas* petition "would result in unfair forfeiture without notice." *Banks IV*, 271 F.3d at 534. Similarly, barring Mr. Pace from filing his pre-1999 federal *habeas* petition would result in forfeiture of his federal rights without notice. Mr. Pace could not, for federal *habeas* purposes, be said to have had knowledge that the PCRA time-limit was jurisdictional on April 23, 1997, the date that he would have had to file in federal court to protect his federal rights.

Pace's second PCRA petition, filed on November 27, 1996, alleged that: (1) the imposition of a life sentence without eligibility for parole was illegal; (2) his guilty plea was **entered involuntarily; and (3) that all counsel were ineffective, resulting in a denial of due process. (§ 2254 Pet at 8.) Mr.** Pace's second PCRA petition alleged claims that traditionally had overcome the PCRA statutory time-bar. On July 23, 1997, the PCRA court denied Mr. Pace's petition on the merits, giving him no notice that his petition was jurisdictionally time-barred. Although the Superior Court dismissed the second PCRA petition as time-barred, Mr. Pace still had no absolute notice that that ruling meant the time-limit was jurisdictional and not waivable due to the nature of the claims that he raised to that court. When on March 2, 1999 Pennsylvania made it clear that the PCRA time-limit was jurisdictional, Mr. Pace had a motion pending before the Pennsylvania Supreme Court requesting Allocatur from the denial for the motion for re-argument by the Superior Court, discussed *supra*. That motion for re-argument had invoked one of the statutory exceptions to the PCRA time-bar, that is, "the failure to raise the claim previously was

the result of interference by government officials with the presentation of the claim . . ." 42 PA. CONS. STAT. ANN. § 9545(b)(i). Mr. Pace, therefore, had no timely notice, while his second PCRA petition was in the state court system, that his failure to file a *habeas* petition in federal court would deny him his right to federal review.

3. Mr. Pace Exercised Reasonable Diligence in Bringing His Claims

a. Pace Would Not Have Been Allowed to File His Petition in Federal Court At The Time Respondents Contend He Would Have Had To In Order To Protect His Federal Rights

Mr. Pace would not have been allowed to proceed on a petition in federal court within the one year AEDPA statute of limitations because the federal courts in this district would have refused to hear his federal claims because he had failed to exhaust his remedies in state court. Mr. Pace filed his second PCRA petition in November 1996. As of September 1997, the third circuit stated that it was still not clear how Pennsylvania courts would interpret amendments to the PCRA and that federal courts should not hear petitions that were not brought in state court simply because they were thought to be excluded by the 1995 amendments to the PCRA. *See Banks I*, 126 F.3d at 211-14; *see also* ***Hammock v. Vaughn*, No. CIV.A.96-3463, 1998 WL 163194, at *6 (E.D. Pa. April 7, 1998) ("There is thus a lack of certainty with respect to state application of [the 1995 PCRA amendments]. This lack of certainty requires dismissal of the petition."); *Peterson v. Brennan*, No. CIV.A.97-2477, 1998 WL 470139, at *6 (E.D. Pa. Aug. 11, 1998) (same).** Only recently have the state courts interpreted the 1995

amendments to the PCRA conclusively enough that federal courts do not have to dismiss federal *habeas* petitions for failure to exhaust state remedies. ***See Lines v Larkins*, 208 F.3d 153, 164 (3d Cir. 2000) ("It is now clear that the one year limitation applies to all PCRA petitions including a second petition, no matter when the first was filed."); *Holman v. Gillis*, 58 F.Supp. 587, 594-96 (July 21, 1999) (finding that the ambiguity relating to whether the one year statute of limitations is a procedural bar to all untimely PCRA petitions that do not qualify for the enumerated exceptions was only remedied in December 1998).**

The third circuit stated in *Fahy:*

> When the state law is unclear regarding the operation of a procedural filing requirement, the petitioner filed in state court because of his or her reasonable belief that a § 2254 petition would be dismissed as unexhausted, and the state petition is ultimately denied on these grounds, then it would be unfair not to toll the statute of limitations during the pendency of the state petition up to the highest reviewing court." 240 F.3d at 245.

It was objectively reasonable for Mr. Pace to believe that if he filed a § 2254 petition at the time he filed his second PCRA petition, the federal petition would have been dismissed without prejudice as unexhausted. There has been no abuse of process by Mr. Pace and he has diligently and reasonably asserted his claims. *See Fahy,* 240 F.3d at 244.

This court equitably tolls AEDPA's statute of limitations while petitioner's second PCRA petition was pending from November 27, 1996 until July 29, 1999, because Mr. Pace meets the relevant factors discussed in *Miller, Jones*

Fahy, and *Banks IV.* In an "extraordinary way," the confluence of the following factors caused the petitioner to be prevented from asserting his federal rights: (1) the uncertainty of Pennsylvania law at the time that Mr. Pace had to choose whether to file a state or federal *habeas* petition; (2) lack of notice of forfeiture to Mr. Pace of his right to federal review of his conviction and sentence; (3) the fact that Mr. Pace would not have been allowed to proceed in federal court at the time he would have been required to file his federal *habeas* petition in order to preserve his federal rights; (4) Mr. Pace has diligently and reasonably asserted his claims; and (5) Mr. Pace's sentence is life without the possibility of parole.

4. Fahy Does Not Preclude a Finding that Petitioner's Second PCRA Petition Equitably Tolled the AEDPA Statute of Limitations

Fahy held that equitable tolling was appropriate in a capital case even where extraordinary circumstances were not established. 240 F.3d at 245. Respondents argue that *Fahy* stands for the proposition that uncertainty in Pennsylvania law cannot constitute extraordinary circumstances. (Resps.' Mot. at 18.) Extraordinary circumstances exist in this case, not based solely on the uncertainty of Pennsylvania law, but also on the unusual confluence of factors that left Mr. Pace, who is serving life in prison without the possibility of parole, without notice of the forfeiture of his federal rights.

Petitioner's sentence, life without the possibility of parole, was imposed when he was only seventeen years old. In applying equitable tolling in a capital case, the third circuit stated, "[i]n a capital case such as this, the consequences of error are terminal, and we therefore pay

particular attention to whether principles of 'equity would make rigid application of a limitation period unfair.'" *Fahy v. Horn,* 240 F.3d at 245 (citing *Miller,* 145 F.3d at 618). The *Fahy* court went on to state, "[w]e elect to exercise leniency under the facts of this capital case where there is no evidence of abuse of process." *Fahy,* 240 F.3d at 245. Mr. Pace's case calls for leniency too because the consequences facing him, the certainty of spending the rest of his life in prison, are extremely grave.[5] Should the court not toll AEDPA's statute of limitations, petitioner will have to spend the rest of his life in prison without being allowed federal review to correct what could be serious deprivations of federally protected constitutional rights. Accordingly, this court finds AEDPA's one year statute of limitations was equitably tolled while petitioner's second PCRA petition was pending.

IV. Conclusion

This court finds that petitioner was entitled to statutory tolling and equitable tolling while his second PCRA petition was pending. Because petitioner's conviction became final before the enactment of AEDPA, he had one year from April 24, 1996, plus the period in which the statute statutorily or equitably tolled, to file his federal *habeas* petition. *See Burns,* 134 F.3d at 111.

[5] The Supreme Court has recognized the special gravity of life without the possibility of parole, noting that the sentence "is far more severe" than a life sentence and that only "capital punishment . . . exceeds it." *Solem v. Helm,* 463 U.S. 277, 297 (1983).

The federal statute of limitations ran from April 24, 1996 to November 26, 1996 (the day before petitioner filed his second PCRA petition) and from July 30, 1999 (the day after the Pennsylvania Supreme Court declined to review the Pennsylvania Superior Court denial of his PCRA petition) until late December, 1999 when petitioner filed his federal *habeas* petition. Given the one year statute of limitations, petitioner had until December 24, 1999 to file his federal *habeas* petition. Petitioner dated his federal *habeas* petition December 22, 1999. The Clerk of Court marked petitioner's *habeas* petition as filed on December 27, 1999. The prison mailbox rule states that the petition is deemed filed when a prisoner gives his petition to prison officials. *See Burns,* 134 F.3d at 113. Since the Commonwealth does not argue otherwise, this court assumes petitioner gave his petition to prison officials by December 24, 1999 making his federal *habeas* petition timely filed.

For the reasons discussed above, the motion for reconsideration is denied. This opinion reaches the same conclusions on statutory and equitable tolling as previously stated in the June 7, 2001 opinion. However, it supersedes the previous opinion to reflect the Supreme Court's decision in *Artuz* and other relevant cases subsequently decided.

The respondents' motion for permission for immediate appeal is granted on the following issues since they involve controlling questions of law as to which there are substantial grounds for difference of opinion and an immediate appeal from this opinion and order may materially advance the earliest efficient resolution of the litigation. The questions of law are

1. Do the enumerated exceptions to Pennsylvania's PCRA statute of limitations, 42 PA. CONS. STAT. ANN. § 9545(b)(1), prevent a late state post collateral petition from being necessarily "improperly filed" for purposes of 28 U.S.C. §2244(d)(2)?

2. Does the confluence of the following factors constitute "extraordinary circumstances" for purposes of equitably tolling AEDPA's one year statute of limitations: (1) the uncertainty of Pennsylvania law at the time that petitioner had to choose whether to file a state or federal *habeas* petition; (2) the lack of notice of forfeiture to petitioner of his right to federal review of his conviction and sentence; (3) the fact that petitioner would not have been allowed to proceed in federal court at the time he would have been required to file his federal *habeas* petition in order to preserve his federal rights; (4) and petitioner's sentence is life without the possibility of parole?

The court stays review of the substantive merits pending outcome of the appeal.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE,	:	CIVIL ACTION
Petitioner,	:	99-6568
	:	
v.	:	
	:	
DONALD VAUGHN, et al.,	:	
Respondent	:	

ORDER

AND NOW, this ___ day of March 2002, upon consideration of Respondents' Motion for Reconsideration, or in the Alternative for Permission to Appeal, Docket # 20, and the responses thereto, it is hereby ORDERED that Respondent's Motion, **is DENIED in part and GRANTED in part. The motion for reconsideration is denied and the motion for an immediate appeal is granted.**

The court certifies that this order involves controlling questions of law on which there are substantial grounds for difference of opinion and an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

In finding petitioner's federal *habeas* petition was timely filed, this Court decided two questions of controlling law:

1. Do the enumerated exceptions to Pennsylvania's PCRA statute of limitations, 42 PA. CONS. STAT. ANN. § 9545(b) (1), prevent a late state post collateral petition from being necessarily "improperly filed" for purposes of 28 U.S.C. §2244(d)(2)?

2. Does the confluence of the following factors constitute "extraordinary circumstances" for purposes of equitably tolling AEDPA's one year statute of limitations: (1) the uncertainty of Pennsylvania law at the time that petitioner had to choose whether to file a state or federal *habeas* petition; (2) the lack of notice of forfeiture to petitioner of his right to federal review of his conviction and sentence; (3) the fact that petitioner would not have been allowed to proceed in federal court at the time he would have been required to file his federal *habeas* petition in order to preserve his federal rights; (4) and petitioner's sentence is life without the possibility of parole?

Answers to these questions will determine whether consideration of the substantive issues raised in the petition is appropriate.

Proceedings are stayed in the district court pending the action by the court of appeals on this certification.

BY THE COURT:

JAMES T. GILES C.J.

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NOT PRECEDENTIAL

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3049

JOHN A. PACE

v.

DONALD VAUGHN; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 99-cv-06568)
District Judge: The Honorable James T. Giles

Submitted Under Third Circuit LAR 34.1(a)
July 7, 2003

BEFORE: NYGAARD, SMITH, and GREENBERG, *Circuit Judges.*

(Filed July 30, 2003)

OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

In this case, the Commonwealth of Pennsylvania argues that the District Court erred by both statutorily and equitably tolling the statute of limitations for the federal habeas corpus petition of appellee John Pace under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d)(2), during the period of time Pace was pursuing post conviction relief in state court under the Pennsylvania Post Conviction Relief Act, 42 Pa. Cons. Stat. Ann. §§ 9541-9546 (1998) (PCRA). At issue is whether Pace's application for state post-conviction relief was "properly filed" under 28 U.S.C. § 2244(d)(2). We hold that our recent case, *Merritt v. Blaine*, 326 F.3d 157 (3d Cir. 2003), controls the analysis here, and because we find that the application was not properly filed and that equitable tolling was not justified, we will reverse the District Court.

I.

The one-year limitation of the AEDPA is statutorily tolled for the "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). Pace's petition was statutorily tolled only if his petition for state post-conviction review was both pending and "properly filed." *Merritt*, 326 F.3d at 162. In *Merritt*, which was decided after Judge Giles issued his opinion, we analyzed our decision in *Fahy v. Horn*, 240 F.3d 239 (3d Cir. 2001):

> We held in *Fahy* that an untimely PCRA petition does not toll the statute of limitations for a federal habeas corpus petition. . . . In *Fahy*, we noted that when applying AEDPA, 'we must look to state law governing when a petition for collateral relief is properly filed' and 'defer to a state's highest court when it rules on an issue.' Consequently, just as in *Fahy*, we must defer to the state court's holding that Merritt's PCRA petition was untimely and it follows that it was not 'properly filed' under AEDPA.

Id. at 165-66 (citations omitted). Because the highest state court had held that Merritt's PCRA petition was untimely, it was not "properly filed" under AEDPA.

We do not see any material distinctions between our treatment of Merritt's *pro se* second PCRA petition and Pace's. We are therefore bound by the state court's finding that Pace's second PCRA petition was untimely, and we must reverse the District Court's order holding that Pace's second PCRA petition was tolled by the statute.

II.

The general requirements for equitable tolling are that (1) the petitioner has established that he has been prevented from asserting his rights "in some extraordinary way," and (2) the petitioner has demonstrated that he "exercised reasonable diligence in investigating and bringing [the] claims." *Id.* at 168 (citations omitted).

The Commonwealth contends that, contrary to the determination of the District Court, the lack of certainty as to how Pennsylvania courts would interpret the PCRA is not an "extraordinary" circumstance. We agree. In *Merritt* we explained:

> We recognized that in 1997, when Fahy's PCRA petition was filed, the newly established PCRA

> time limit was 'unclear' and 'inhibitively opaque.' Indeed, we stated that based on that uncertainty, Fahy 'reasonably believed that the state petition was properly filed.' However . . . in *Fahy* we 'did not hold that this lack of clarity in Pennsylvania law constituted extraordinary circumstances.' In fact, we stated that 'in non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling.' Instead of finding extraordinary circumstances, we based our decision to apply equitable tolling in *Fahy* on the accepted principle that 'death is different.' . . . This case is similar to *Fahy*. . . . [I]t was not unreasonable (indeed it was appropriate) for Merritt to have believed he was required to exhaust his state remedies by filing a second PCRA petition prior to filing a habeas petition in federal court. . . . Although Merritt faces the grave penalty of mandatory life sentence without the possibility of parole, we cannot apply the rationale of *Fahy* to Merritt's situation without violating our tradition of avoiding intracircuit conflict of precedent.

Merritt, 326 F.3d at 169-70 (citations omitted). *Merritt* established that the uncertain PCRA time limit is not an "extraordinary" circumstance in the case of mandatory life sentence without the possibility of parole. In addition, the *Merritt* panel held that because Merritt did not act promptly after the decisions of the Pennsylvania Superior Court in 1997,[1] at which point "Pennsylvania law as to the time bar of the PCRA became clear," there was no basis to

[1] *See Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa. Super. Ct. 1997); *Commonwealth v. Conway*, 706 A.2d 1243 (Pa. Super. Ct. 1997).

find Merritt's habeas petition timely under the doctrine of equitable estoppel. This case is on all fours with *Merritt*. We therefore conclude that there are no extraordinary circumstances that would allow for equitable tolling.

III.

In conclusion, we hold that there is no basis to find Pace's habeas petition timely, either under the statute or under the doctrine of equitable estoppel. Indeed, Pace himself concedes that "*Merritt* is materially indistinguishable from *Pace* and, thus, *Merritt's* denial of both statutory and equitable tolling would apply here." Appellee's Supp. Br. Re: *Merritt*, at 1. Based on the foregoing, we will reverse the District Court, and dismiss Pace's petition for habeas corpus as time-barred under the AEDPA.

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3049

JOHN A. PACE

v.

DONALD VAUGHN; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Appellants

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(Dist. Ct. No. 99-cv-06568)

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, *Chief Judge*,
SLOVITER, NYGAARD, ALITO, ROTH, MCKEE,
BARRY, AMBRO, FUENTES, SMITH,
CHERTOFF, and GREENBERG, *Circuit Judges*[1]

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to

[1] Judge Greenberg's vote is limited to panel rehearing only.

all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

/s/ [Illegible]
United States Circuit Judge

DATE: Oct. 6, 2003

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(1)

No. 03-9627

Supreme Court, U.S.
FILED
DEC 16 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOHN A. PACE,

Petitioner,

v.

DAVID DiGUGLIELMO, Superintendent,
State Correctional Institution at Graterford,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Was Petitioner's application for state post-conviction relief "properly filed" for purposes of statutory tolling under 28 U.S.C. § 2244(d)(2), where the procedural default rule ultimately invoked by the state court to deny post-conviction relief acted as a condition to obtaining relief on claims, but not a condition to filing the application?

2. Is equitable tolling of the federal habeas statute of limitations during state court exhaustion appropriate, where state court decisions made it appear that state remedies were available, decisions of the federal court of appeals required the petitioner to exhaust in the manner he did, and the district court would have required the petitioner to exhaust had petitioner filed in federal court first?

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The District Court's opinions are at JA447 (*Pace v. Vaughn*, 151 F.Supp.2d 586 (E.D. Pa. 2001)) and JA503 (*Pace v. Vaughn*, 2002 WL 485689 (E.D. Pa. March 29, 2002)). The Third Circuit's opinion is at JA534 (*Pace v. Vaughn*, 2003 WL 21754982 (3d Cir. July 30, 2003)). The Third Circuit's order denying rehearing is at JA539.

JURISDICTION

This Court granted *certiorari* on September 28, 2004, and has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes and rules involved are set forth in the Appendix to this Brief ("App."). This case involves:

28 U.S.C. § 2244(d), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), App. 1;

42 Pa.C.S. § 9544 (West 2004), App. 2;

42 Pa.C.S. § 9545 (West 2004), App. 5;

Pennsylvania Rules of Criminal Procedure ("Pa.R.Cr.P.") 1501-1509 (West 1997), App. 10;

Pennsylvania Rules of Criminal Procedure ("Pa.R.Cr.P.") 1500-1510 (West 1998 rev. ed.), App. 28.

STATEMENT OF THE CASE[1]

The United States Court of Appeals for the Third Circuit denied Petitioner all federal review of the constitutional validity of his conviction and sentence of life imprisonment without parole. The Third Circuit ruled that Petitioner's efforts to exhaust his claims in state court before pursuing habeas corpus relief in federal court did not toll AEDPA's one-year statute of limitations because the Pennsylvania appellate court ruled that Petitioner's state post-conviction petition was untimely.

The Third Circuit reversed the ruling of Chief District Judge James T. Giles as to statutory tolling. Chief Judge Giles had found statutory tolling appropriate under 28 U.S.C. § 2244(d)(2) because Petitioner "properly filed" in state court in an effort to exhaust his claims. The Third Circuit also reversed the ruling of Chief Judge Giles that equitable tolling was appropriate. Chief Judge Giles had found equitable tolling appropriate because, *inter alia*, Third Circuit law required the state court exhaustion Petitioner pursued; Chief Judge Giles himself would have required exhaustion if Petitioner had filed a habeas petition without first seeking state court remedies; and Pennsylvania's courts had created judicial exceptions to statutory procedural default rules, under which state post-conviction remedies appeared to be available.

As to statutory tolling, the Third Circuit held that a post-conviction petition ultimately denied as untimely by the state courts could never be "properly filed" so as to toll

[1] All emphasis in this brief is supplied unless otherwise indicated. The Joint Appendix is cited as "JA" followed by the page number.

the AEDPA filing period under § 2244(d)(2). *See* JA535-536. As to equitable tolling, the Third Circuit held that Chief Judge Giles' findings would not justify equitable tolling in a non-capital case, although uncertainties in Pennsylvania post-conviction law would justify equitable tolling in a capital case. *See* JA536-538.

The facts and procedural history culminating in this harsh result are as follows.

A. The trial court proceedings. In September 1985, when Petitioner was seventeen years old, he was arrested for assaulting and robbing Randolph Baldwin. Ten days later, Mr. Baldwin died. Petitioner was charged with murder.

Attorney Moira Dunworth was appointed. She advised Petitioner to plead guilty to second-degree murder. She did not tell Petitioner that the life imprisonment sentence for second-degree murder in Pennsylvania is life without parole. Instead, she told Petitioner he would be eligible for parole on the life sentence after serving ten to fifteen years. She also told Petitioner's parents and brother that Petitioner would be parole-eligible from the life sentence. She asked them to convince Petitioner that he should plead guilty to second-degree murder.[2]

Petitioner pled guilty to second-degree murder on February 13, 1986, in reliance on the misinformation counsel gave him. During the plea colloquy, the court told Petitioner he would be sentenced to "life imprisonment," but did not define that phrase or correct the erroneous

[2] The facts are taken from Petitioner's allegations in the state and district courts. *See, e.g.*, JA190-191, JA382-384.

parole-eligibility information counsel had provided, JA63-64, and suggested Petitioner would be parole-eligible:

> I surely will recommend and make part of the sentencing order that the defendant be confined at Camp Hill or a suitable facility for someone of his age, where he can obtain some help toward *rehabilitation*, particularly since he is a young man and at some time in the future, *may be subject to release* and it is hoped that the prison sentence, for *whatever duration it be*, certainly aid him in *rehabilitating* him.

JA83-84.

Counsel at no time corrected the erroneous information she had given Petitioner. She did not move to withdraw the guilty plea. She did not file a direct appeal. Petitioner would not have pled guilty and would have asserted his right to trial if he had not been misinformed.

B. The 1986-92 "PCHA" proceedings: While in prison, Petitioner learned that he was not eligible for parole. He filed a *pro se* petition in August 1986 under the "PCHA" (Post-Conviction Hearing Act), Pennsylvania's mechanism for post-conviction relief at that time. JA86-92. The court appointed PCHA counsel, who amended the petition with argument concerning guilty plea counsel's ineffectiveness. JA108-114. At a hearing, PCHA counsel called Petitioner as a witness, but did not call guilty plea counsel even though guilty plea counsel told PCHA counsel "that she did not explain Life was Life without parole simply because she had a very difficult emotional time

dealing with such a prospect." JA200 (representation by PCHA counsel).[3]

In July 1991, the PCHA court denied relief. JA119-121. Counsel appealed, arguing only that guilty plea counsel was ineffective for misinforming Petitioner about parole-eligibility. JA122-132. The Superior Court affirmed in March 1992. JA142. The Pennsylvania Supreme Court denied discretionary review in September 1992. JA183.

C. The 1988 and 1996 changes to Pennsylvania's post-conviction statute and rules: In 1988, the PCHA was replaced by the "PCRA," the Post Conviction Relief Act, 42 Pa.C.S. § 9541, *et seq*. By its terms, the PCRA applied only to post-conviction proceedings filed after its enactment, and not to Petitioner's PCHA litigation. *See* 42 Pa.C.S. § 9545, Historical and Statutory Notes.

The PCRA included procedural default. An issue was "waived" under the PCRA's statutory language "if the petitioner failed to raise it and if it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or other proceeding actually conducted or in a prior proceeding actually initiated under this subchapter." 42 Pa.C.S. § 9544(b), Historical and Statutory Notes (quoting 1988-96 PCRA).

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[3] Petitioner testified about the misinformation guilty plea counsel gave him; that when the court said he would be sentenced to "life imprisonment," he "didn't know what life sentence meant"; and that he relied on "what my counsel told me, that I would do 10, 12 or 15 years." JA126-128. PCHA counsel noted that Petitioner's belief was "not some fantasy"; it "was a product of what he was told" and a "common belief in America" about the availability of parole. JA130.

Pennsylvania's courts developed caselaw exceptions to statutory procedural default, pursuant to which a petitioner could have the merits of his defaulted claims reviewed. The judicial exceptions to statutory procedural default applied when: (1) the petitioner asserted that all prior counsel in the case had provided ineffective assistance, and this included prior post-conviction counsel; (2) the petitioner asserted that denial of relief would be a "miscarriage of justice" as that term was defined by the Pennsylvania courts; or (3) the petitioner asserted his sentence was "illegal."[4]

Effective January 16, 1996, the PCRA was amended. *See* Act of Nov. 17, 1995, P.L. 1118, No. 1995-32 (Spec.Sess. 1) (effective in 60 days). The 1996 amendments included a new procedural default rule – a time-bar. *See* 42 Pa.C.S. § 9545(b). The new statutory language stated that a PCRA petition was to be filed within one year from when the conviction became final, § 9545(b)(1). The statutory language also stated that a claim filed after that would be timely if the failure to raise the claim earlier resulted from interference by governmental officials, or the claim was based on newly discovered facts, or the claim was based on a new, retroactive rule of constitutional law, § 9545(b)(1)(i)-(iii). The statute stated that claims based upon these exceptions must be filed "within 60 days of the date the claim could have been presented," § 9545(b)(2).

The 1996 statutory amendment stated that the new rules "shall apply to petitions filed after the effective date of this act; however, a petitioner whose judgment has

[4] Other exceptions to procedural default were applied only to capital cases, but are not at issue here.

become final on or before the effective date of this act shall be deemed to have filed a timely petition . . . if the petitioner's first petition is filed within one year of the effective date of this act." 42 Pa.C.S. § 9545, Historical and Statutory Notes.[5]

Pennsylvania's Rules of Criminal Procedure governing PCRA proceedings ("PCRA Rules") were not altered when the time-bar was added to the statute in 1996. *See* Pa.R.Cr.P. 1501-1509 (West 1997). The PCRA Rules did not mention the time limits at all until those Rules were amended on August 11, 1997. *See* Pa.R.Cr.P. 1500-1510 (West 1998 rev. ed.).[6]

Even after the August 11, 1997 amendments to the PCRA Rules, Rule 1502, which set forth the required "content of [a] motion for post-conviction collateral relief," did not mention the time limits or require that a PCRA petition contain any allegations about time limits. Pa.R.Cr.P. 1502 (West 1998, rev. ed.) (capitalization altered); *see also id.*, Comment (PCRA petition "must include . . . substantially all of the information set forth in this rule").

Similarly, the "standard PCRA petition form," provided to Pennsylvania prisoners by the Commonwealth,

[5] The amendment did not say if the one year grace period for filing a "first petition" applied to the "first petition" filed after the amendment's effective date, the "first petition" filed under the PCRA (rather than the PCHA or some other collateral attack), or the "first petition" seeking collateral relief of any kind.

[6] The PCRA Rules were renumbered on March 1, 2000, and are now at Pa.R.Cr.P. 900-910. Unless otherwise indicated, citations herein are to Rules 1501-1509 (West 1997), which were in effect while Petitioner's PCRA petition was in the trial court.

"does not reference the PCRA's time limitation." *Commonwealth v. Smith*, 818 A.2d 494, 501 (Pa. 2003); *see also* Pa.R.Cr.P. 1502, Comment (requiring creation of "form motion . . . incorporating the required contents set forth herein . . . for distribution to uncounseled defendants").

D. The 1996-99 "PCRA" proceedings: On November 27, 1996, Petitioner filed a *pro se* PCRA petition, JA184-201, and memorandum of law, JA202-227.[7] The *pro se* PCRA petition meticulously tracked Rule 1502's requirements for the contents of a PCRA petition and contained all the information required by Rule 1502. *Compare* Pa.R.Cr.P. 1502, with JA187-194. Petitioner sought and was granted leave to proceed *in forma pauperis*. Pursuant to the PCRA statute and rules, he filed in the Philadelphia Court of Common Pleas, where he was convicted. *See* Pa.R.Cr.P. 1501 (PCRA proceeding "shall be initiated by filing . . . with the clerk of the court in which the defendant was convicted and sentenced"); 42 Pa.C.S. § 9545(a) ("Original jurisdiction over a proceeding under this subchapter shall be in the court of common pleas.").

The *pro se* PCRA petition raised two new claims that had not been presented in the earlier (PCHA) proceedings: that a life-without-parole sentence for the crime to which Petitioner pled guilty is illegal under Pennsylvania law and violates the Eighth and Fourteenth Amendments, JA189, JA192, JA202-212; and that the guilty plea colloquy was

[7] November 27 is actually when the petition was *received* by the clerk. Because Pennsylvania applies the "mailbox rule" to unrepresented, incarcerated PCRA petitioners, Petitioner's actual filing date is earlier than November 27. *See Commonwealth v. Jones*, 700 A.2d 423, 426 (Pa. 1997); *Commonwealth v. Jerman*, 762 A.2d 366 (Pa.Super. 2000); *Commonwealth v. Little*, 716 A.2d 1287 (Pa.Super. 1998).

defective and violated state law and due process, JA190, JA192-193, JA213-220. The PCRA petition also presented new evidence that had not been considered in the earlier proceedings (three affidavits and a letter) to show that guilty plea counsel had been ineffective in misinforming Petitioner about parole-eligibility and that PCHA counsel had ineffectively presented the claim by, *inter alia*, failing to call guilty plea counsel as a witness at the PCHA hearing. JA190-191, JA193-201, JA218-224.[8]

Relying on the judicial exceptions to default, the *pro se* PCRA petition and memorandum explained that neither the new claims nor the new evidence should be procedurally barred. Petitioner argued that: (1) all prior counsel (including PCHA counsel) were ineffective for failing to raise the new claims and present the new evidence, *e.g.*, JA189, JA191-194, JA220-224, JA226; (2) failure to consider the new claims and evidence would constitute a "miscarriage of justice," as that term is defined by Pennsylvania's courts, *e.g.*, JA192, JA217, JA219, JA223; and (3) one of the new claims is a challenge to the legality of Petitioner's sentence, *e.g.*, JA189, JA192, JA202. Petitioner cited Pennsylvania caselaw on these judicial exceptions to default, to show that procedural default rules in

[8] The affidavits are from Petitioner's parents and brother; they state that guilty plea counsel gave them the same misinformation about parole-eligibility that she gave to Petitioner, and asked them to advise Petitioner to plead guilty. The letter is from PCHA counsel to Petitioner and states that guilty plea counsel admitted to PCHA counsel that she did not tell Petitioner that life imprisonment was without parole. *See* JA195-201.

Pennsylvania normally are overcome by allegations like his.[9]

Pursuant to the PCRA Rules, the case was docketed and assigned to the original judge. *See* Pa.R.Cr.P. 1503(a) ("Upon receipt . . . the clerk . . . shall immediately docket the [petition] to the same term and number as the underlying conviction and sentence. The clerk shall thereafter transmit the [petition] and the record to the trial judge"). Pursuant to the PCRA Rules and "after reviewing the record," the judge appointed counsel on January 17, 1997. JA228 (capitalization altered); *see also* Pa.R.Cr.P. 1504(c) (for successive petitions, "judge shall appoint counsel . . . whenever the interests of justice require it"). The judge gave counsel several months to review the case. JA229.

On June 13, 1997, appointed counsel filed a "*Finley* letter," stating his belief that Petitioner's claims "either have been finally litigated or are patently frivolous."

[9] *See, e.g.*, JA202, JA217, JA226, citing, *inter alia*, *Commonwealth v. McNeil*, 439 A.2d 664, 666 (Pa. 1981) (merits review of claims raised in second post-conviction petition because petitioner alleged ineffectiveness of all prior counsel for failing to raise the claims); *Commonwealth v. Bradley*, 480 A.2d 1205, 1206-07 (Pa.Super. 1984) (same); *Commonwealth v. Bable*, 375 A.2d 350 (Pa.Super. 1977) (granting post-conviction relief because of defective guilty plea colloquy; waiver overcome by allegation of ineffective assistance of prior counsel); *Commonwealth v. Fay*, 439 A.2d 1227, 1229 (Pa. 1982) (defective guilty plea colloquy is miscarriage of justice as defined in Pennsylvania – "[n]o civilized society could tolerate the waiver of such basic rights from one who was unaware of or misinformed as to . . . a critical fact"; granting post-conviction relief on defective guilty plea colloquy claim not previously raised); *Commonwealth v. Campbell*, 505 A.2d 262, 265 & n.8 (Pa.Super. 1986) (en banc) (challenge to legality of sentence cannot be waived and "may be raised for the first time . . . in a collateral proceeding"). *See also* Argument § II.A.2, *infra* (describing additional Pennsylvania decisions).

JA229, 235.[10] Pursuant to the PCRA Rules, the judge notified Petitioner that he had read appointed counsel's "*Finley* letter . . . and the trial record"; that "your petition will be dismissed at the next listing on Wednesday, July 23, 1997" because the judge believed the issues "are without merit"; and that Petitioner had ten days to respond to the notice. JA236; *see* Pa.R.Cr.P. 1507(a) ("If the judge is satisfied . . . that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, . . . the judge shall give notice to the parties of the intention to dismiss. . . . The defendant may respond to the proposed dismissal within 10 days. . . .").

Petitioner responded to the notice. He challenged appointed counsel's "*Finley* letter." He explained that appointed counsel had not had any meaningful discussions with him, was not available for phone calls and had not responded to Petitioner's letters. He asked for thirty days to further respond because the court's notice has been sent to the wrong prison and it was difficult for Petitioner to get access to the law library. JA238-239.

The judge denied PCRA relief on the scheduled date, July 23, 1997, stating that Petitioner's claims were previously litigated and meritless. JA240-243. The judge *did not apply the PCRA time-bar to any claim*. Appointed counsel was formally relieved. Pursuant to the PCRA Rules, the judge notified Petitioner, by certified mail, of

[10] *See Commonwealth v. Finley*, 550 A.2d 213 (Pa.Super. 1988); *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988), describing Pennsylvania's "*Finley* letter" procedure. After an appointed lawyer files a "*Finley* letter" and withdraws from the case, the petitioner has the right to continue seeking PCRA relief *pro se* in the trial court and on appeal.

the dismissal and of Petitioner's right to appeal to the Superior Court by filing a notice of appeal within thirty days. JA244; *see* Pa.R.Cr.P. 1507(d)(2) ("When the motion is dismissed without a hearing, the judge: . . . shall advise the defendant by certified mail, return receipt requested, of the right to appeal . . . and the time within which the appeal must be taken.").

In August 1997, Petitioner appealed *pro se* to the Superior Court, which set a briefing schedule. In April 1998, Petitioner filed his Superior Court brief, JA245-292, making substantially the same merits and procedural bar-overcoming arguments he had made in the lower court. *See, e.g.*, JA252, JA255, JA277, JA279-280, JA282 (ineffective assistance of all prior counsel); JA252, JA255-256, JA272-273, JA275, JA278-280 (miscarriage of justice); JA252, JA254, JA256-257 (illegal sentence).

In May 1998, the Commonwealth filed a brief asserting, *for the first time*, that Petitioner's claims were untimely under the new PCRA time-bar, § 9545(b). JA293-298. The Commonwealth cited a December 17, 1997 Superior Court decision, *Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa.Super. 1997), that had applied the time-bar.[11] The Commonwealth asked the Superior Court to

[11] *Alcorn* was decided after Petitioner's trial court litigation was completed. *Alcorn* said that judicial interpretation of the new time-bar was a "question of first impression," as there were "no prior decisions interpreting this section." *Id.* at 1056. *Alcorn* stated for the first time, and without analysis or citation to authority, that the new time limits were a matter of "jurisdiction." *Id.* at 1056-57. *Alcorn* stated that there was no grace period because Alcorn's petition was his "second under the PCRA," that Alcorn's claims did not satisfy any exception under § 9545(b)(1)(i)-(iii), and that Alcorn's petition was untimely because, under the statutory language and without a grace period, it should

(Continued on following page)

quash the appeal. In the alternative, the Commonwealth asked the Superior Court to affirm the lower court's denial of PCRA relief. JA298.

Petitioner filed a reply brief, JA299-311, responding to the Commonwealth's time-bar argument. First, Petitioner cited Pennsylvania caselaw that appellate review in PCRA cases "is limited to determining whether a trial court's findings are supported by the record and whether its order is otherwise free of legal error," JA302, citing *Commonwealth v. Stark*, 658 A.2d 816 (Pa.Super. 1985), thus suggesting that the Superior Court could not address the Commonwealth's time-bar argument – which the Commonwealth first raised on appeal and upon which the lower court had not relied. Petitioner also argued that the PCRA time-bar raised "a question of waiver, not a question of jurisdiction as the Commonwealth argues," JA309; thus, the concept that jurisdictional issues could be raised at any time did not apply.

Second, Petitioner argued that the bar-overcoming assertions he had made in his prior brief (ineffectiveness of all prior counsel, "miscarriage of justice" as defined by the Pennsylvania courts, and illegal sentence) "are judicial exceptions to the waiver doctrine of the old PCRA legislation" and they "certainly should be retained as a judicial exception under the new PCRA legislation," including "as a *judicial exception* to the time bar," since the judicial exceptions to statutory bars had not been overruled by the Pennsylvania Supreme Court. JA303-304 (emphasis in

have been filed in 1992, four years before the PCRA had time limits. *Id.* at 1056-57.

original); *see also* JA302, JA304, JA309 (further argument regarding judicial exceptions to procedural default).

Third, Petitioner argued that application of the PCRA time-bar to him would be unconstitutionally retroactive, in violation of due process: before the time-bar took effect Petitioner had a right to file a PCRA petition at any time; the time-bar retroactively abrogated this right one year after his conviction became final – that is, ten years before the time-bar took effect. JA305-308, citing, *inter alia*, *Texaco v. Short*, 454 U.S. 516, 527 n.21 (1982) (quoting *Wilson v. Iseminger*, 185 U.S. 55 (1902)). Petitioner also argued that it would be "a violation of separation of powers" under Pennsylvania's Constitution to allow the Legislature to abrogate the bar-overcoming law created by Pennsylvania's courts. JA303.

Fourth, Petitioner argued that he was entitled to relief under the statutory exception to the time-bar for newly discovered facts, § 9545(b)(1)(ii), because he was an incarcerated layperson and had filed as soon as he became aware of his claims. JA308.[12]

On December 3, 1998, the Superior Court affirmed the denial of PCRA relief. JA312-317. The Superior Court did not address Petitioner's anti-bar arguments, but said: the time limits are "jurisdictional," JA314; there was no grace period, JA316; Petitioner should have filed his claims within one year from when his conviction became final in 1986 – *i.e.*, ten years *before* the time limits were added to

[12] For example, the three affidavits Petitioner proffered with his *pro se* PCRA petition, JA195-199, were obtained less than sixty days before he filed the petition.

the PCRA, JA316; and the claims were untimely unless they satisfied the § 9545(b)(1) exceptions, JA316.

The Superior Court stated it "reviewed the exceptions under section 9545(b)(1) and f[ou]nd that none is applicable." JA316. It therefore affirmed the denial of PCRA relief, JA317, but *did not grant the Commonwealth's motion to quash the appeal*.

On December 15, 1998, Petitioner timely sought reargument, JA318-323, as provided by Pennsylvania's Rules of Appellate Procedure 2541, *et seq*. Petitioner again argued that the time-bar should not be applied retroactively. JA320. Petitioner argued that the Superior Court had "completely overlooked" his argument that his illegal sentence claim "cannot be waived." JA321.

Petitioner also argued that his claims were timely under the statutory exception to the time-bar in § 9545(b)(1)(i) ("interference by governmental officials") because prison officials had destroyed all of his legal documents, which had prevented him from filing earlier for PCRA relief. JA320-321.

Reargument was denied without comment on February 8, 1999. JA326. Petitioner sought Pennsylvania Supreme Court review, JA327-370, raising similar arguments, but the Pennsylvania Supreme Court denied review without comment on July 29, 1999. JA372.

E. The District Court proceedings and findings. On December 24, 1999, Petitioner filed a *pro se* habeas petition, JA373-390, raising claims from both the PCHA and PCRA proceedings. The Commonwealth claimed the petition was untimely under AEDPA's statute of limitations, 28 U.S.C. § 2244(d)(1), arguing that Petitioner's

PCRA proceedings did not toll the federal limitations period. JA391-396.

Chief District Judge James T. Giles rejected the Commonwealth's AEDPA time-bar arguments. *See* JA447-466. The District Court found statutory tolling under 28 U.S.C. § 2244(d)(2) (tolling during "properly filed" state post-conviction proceedings). The District Court also found equitable tolling given the circumstances of this case.

The Commonwealth moved for reconsideration or permission to appeal. The District Court appointed counsel. JA467. After briefing and argument, the District Court denied reconsideration but permitted the Commonwealth to appeal, and prepared a second opinion addressing the arguments in the Commonwealth's motion. *See* JA503-533.

The District Court explained that it found statutory tolling appropriate under § 2244(d)(2) because the PCRA petition was "properly filed" as that term was interpreted by this Court in *Artuz v. Bennett*, 531 U.S. 4 (2000), and by the Fifth and Ninth Circuits applying *Artuz* in similar situations. *See* JA511-519, citing *Artuz*; *Smith v. Ward*, 209 F.3d 383 (5th Cir. 2000); *Dictado v. Ducharme*, 244 F.3d 724 (9th Cir. 2001).

The District Court recognized that *Artuz* "left open the question" of whether a post-conviction petition deemed untimely by the state courts may be "properly filed" under § 2244(d)(2). JA512. However, the District Court concluded that the *analysis* in *Artuz* shows that Petitioner's PCRA petition was "properly filed," even though it was ultimately procedurally barred as untimely by the state courts. The District Court explained that *Artuz* found a state post-conviction petition "properly filed" when all of its claims were procedurally barred under state law and

that *Artuz* stated: the "question whether an application has been properly filed is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." JA511, quoting *Artuz* at 9.

The District Court also explained that in addressing "properly filed," "*Artuz* distinguishe[d] between state [post-conviction] statutes . . . which set forth 'a condition to filing' as opposed to 'a condition to obtaining relief.'" JA511, quoting *Artuz* at 11. Under *Artuz*, state court *applications* that violate a "condition to filing" are not "properly filed," but state court applications with *claims* that violate a "condition to obtaining relief" are still "properly filed." *Id.*

The District Court also noted that the Fifth and Ninth Circuits, applying *Artuz*, had held that if the state time limit contains exceptions, as does Pennsylvania's, and the state courts accept the petition for filing and review it to see if any exception is met, "the [state court] petition, even if untimely, should be regarded as 'properly filed,'" because such a time limit "'does not impose an absolute bar to filing' and is a 'condition to obtaining relief' rather than a 'condition to filing.'" JA512, quoting *Dictado*, 244 F.3d at 728-29, and citing *Smith*, 209 F.3d at 384-85. For the same reasons, the PCRA time-bar is a "condition to obtaining relief" on claims, rather than a "condition to filing" a petition. JA514-515. The District Court explained that the PCRA time-bar:

> is not an absolute bar to filing a second or successive petition more than a year after the conviction became final. The statute contains exceptions that require "some level of judicial review" [*Smith*, 209 F.3d at 384] to examine the

> merits of the petition before it can be dismissed as time-barred. . . .
>
> Therefore, this court sees [the PCRA time-bar] as imposing conditions for obtaining relief and not as an absolute bar to filing a petition. . . . Mr. Pace's second PCRA petition was untimely under Pennsylvania law in that it was too late for him to obtain relief under Pennsylvania law, yet, the PCRA petition was "properly filed" for purposes of federal law and tolled AEDPA's statute of limitations. . . .

JA515.[13]

The District Court also found equitable tolling appropriate, for several reasons.

First, when Petitioner filed his PCRA petition, it appeared that PCRA relief might be available. Pennsylvania's courts had established a large body of decisional law that normally trumped the PCRA's statutory procedural bar rules. It appeared under Pennsylvania decisions that relief could be available on an untimely claim if the failure to raise it earlier was due to ineffective assistance of prior counsel, including prior post-conviction counsel; if failure to address the claim was a "miscarriage of justice" under Pennsylvania law; or if the claim challenged the legality of the sentence. Since Petitioner's PCRA petition

[13] The District Court distinguished *Fahy v. Horn*, 240 F.3d 239 (3d Cir. 2001), which had held that untimely PCRA proceedings are not "properly filed," because *Fahy* did not cite *Artuz* and, therefore, did not give "properly filed" the interpretation *Artuz* requires; moreover, *Fahy* relied on a pre-*Artuz* decision of the Ninth Circuit which was vacated and disavowed after *Artuz*. *See* JA516-519. In reversing the District Court, the Third Circuit nevertheless would later treat *Fahy* as controlling. *See* JA535-536.

relied upon these traditional bar-trumping judicial rules, it was reasonable for Petitioner to believe that PCRA relief might be available even if his claims were "untimely" under the statutory language of § 9545(b). JA462-463, JA519-528. Moreover, the statutory language of the one year grace period for the PCRA time-bar, *see* subpart C, *supra*, left open the possibility that the grace period applied to Petitioner, who was filing his first petition since the amendments – further suggesting that his claims would not be barred as "untimely." JA449, JA522.

Second, the District Court explained that Third Circuit precedent required that a federal habeas petition with unexhausted claims be dismissed for exhaustion in PCRA proceedings at the time Petitioner was pursuing PCRA relief. The District Court found that it would have dismissed and required exhaustion had Petitioner filed a federal habeas petition instead of his PCRA litigation. Accordingly, for equitable tolling purposes, Petitioner appropriately pursued relief in state court. JA462-463, JA526-528.

Third, the District Court noted that Petitioner's sentence of life imprisonment without parole is severe, weighing in favor of equitable tolling. JA464, JA528-529. Fourth, the District Court found that Petitioner had "diligently and reasonably asserted his claims" throughout all proceedings, also weighing in favor of equitable tolling. JA528.

Given all these circumstances, the District Court found equitable tolling appropriate because denial of tolling, and the resulting loss of federal review, would be "an extraordinary deprivation of rights" and "patently unfair." JA462-463.

SUMMARY OF ARGUMENT

Petitioner's right to federal habeas review of the constitutionality of his conviction and life without parole sentence depends entirely upon whether his state post-conviction proceedings tolled AEDPA's statute of limitations.

I. Statutory tolling is appropriate. AEDPA's § 2244(d)(2) tolls the federal habeas one-year filing period during litigation of a "properly filed application" for state post-conviction review. Petitioner's PCRA petition was a "properly filed application" as that term was understood by this Court in *Artuz v. Bennett*, 531 U.S. 4 (2000).

Under state law, Petitioner could file the petition at any time, without seeking permission. There was no barrier or condition to filing. Because he filed his petition in the right court (where he was convicted), state law required the clerk to docket the petition and transmit the petition and the record to the state judge for review. State law allowed appointment of counsel; the state judge appointed counsel and gave counsel several months to brief the claims. State law required the judge to review the petition, record and counsel's submission before ruling; the state judge did so.

State law required that judicial review of timeliness *vel non* be done on a claim-by-claim basis – a single PCRA petition may contain both timely and untimely claims. The state judge did not rule that any claim raised by Petitioner was untimely. State law required that Petitioner be informed he could appeal as of right; the state judge so informed Petitioner. State law required ordinary appellate review; the state appellate court provided such review, and did not grant the Commonwealth's request that the appeal

be quashed. State law required the appellate court to review claim-by-claim for timeliness; the state appellate court did so.

The state appellate court ultimately held that Petitioner's claims were untimely, and denied post-conviction relief. But state law allowed Petitioner to file and litigate his PCRA petition, and state law required the state courts to afford judicial review. The PCRA time limits do not impose a condition on filing the petition although, like any procedural default, they prohibit relief on certain claims. Like the post-conviction petition in *Artuz*, Petitioner's PCRA petition was "properly filed" and tolled the AEDPA time for filing under § 2244(d)(2).

II. Equitable tolling is also appropriate. When Petitioner filed his PCRA petition, it was not at all clear that it would ultimately be deemed untimely. To the contrary, it affirmatively appeared that state court merits review might be available to Petitioner. Precisely because Pennsylvania court decisions on the availability of PCRA review made PCRA review appear available for prisoners such as Petitioner, Third Circuit exhaustion law required Petitioner to pursue review under the PCRA at the time he pursued that review. The District Court here specifically found that if Petitioner had filed a federal habeas petition, instead of the PCRA petition, the habeas petition "would have been dismissed" and Petitioner would have been required to do what he did do – file a PCRA petition to exhaust state remedies before seeking federal review.

Under these circumstances, where it was utterly unclear that state court remedies would not be available, state law made a state remedy appear available, and Petitioner complied with existing federal Circuit law and

did what the federal Circuit had told Pennsylvania prisoners to do, AEDPA's limitations period should be tolled. As the District Court found, denial of tolling and federal review under these circumstances is "an extraordinary deprivation of rights" and "patently unfair."

ARGUMENT

I. THE THIRD CIRCUIT WAS WRONG TO DENY PETITIONER STATUTORY TOLLING AND FEDERAL REVIEW.

The Third Circuit did not give proper regard to this Court's decision in *Artuz v. Bennett*, 531 U.S. 4 (2000), and misapplied this Court's decision in *Carey v. Saffold*, 536 U.S. 214 (2002).

A. Petitioner's State Court Proceedings Were "Properly Filed."

Section 2244(d)(2) tolls AEDPA's statute of limitations for the "time during which a properly filed application for State post-conviction . . . review . . . is pending." Because the PCRA petition was a "properly filed application" under § 2244(d)(2), the habeas petition is timely under § 2244(d)(1).

Artuz v. Bennett, 531 U.S. at 7, found "properly filed" a successive state post-conviction petition when all of "the claims it contained were subject to two procedural bars under [state] law." In *Artuz*, the state argued that the petition was not "properly filed" because it did not comply "with all mandatory state-law procedural requirements that would bar review of the merits of the application." *Id.* at 8. This Court rejected the state's argument, explaining

that "the question whether an application has been 'properly filed' is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural bar." *Id.* at 9 (emphasis in original).

This Court's "properly filed" analysis is grounded in the distinction between state court rules that create a "*condition to filing*" a petition and state court rules that are a "*condition to obtaining relief*" on the *claims* in the petition. *Artuz*, 531 U.S. at 11. If a petition violates a "condition to filing," it is not "properly filed." On the other hand, if the state courts allow the petition to be filed and considered, but apply a procedural bar against its claims and deny relief – *i.e.*, if the *claims* violate a "condition to obtaining relief" – the petition is still "properly filed." *Id.*

This Court identified as typical "conditions to filing" rules that forbid filing altogether or require the applicant to obtain pre-filing permission from the court. *See Artuz*, 531 U.S. at 8-9, citing *Martin v. District of Columbia Court of Appeals*, 506 U.S. 1 (1992), and AEDPA's 28 U.S.C. §§ 2244(b)(3)(A) & 2253(c).[14]

[14] *Martin* directed the clerk not to accept filings from an abusive litigant unless he complied with certain preconditions. Section 2244(b)(3)(A) requires a prisoner who wants to file a successive habeas petition in the district court to first obtain permission from the court of appeals. Section 2253(c) requires permission (*i.e.*, a certificate of appealability) before an appeal may be taken. Pennsylvania's PCRA has no such preconditions to filing, but other states do. *Compare Tinker v. Hanks*, 255 F.3d 444, 445-46 (7th Cir. 2001) (Indiana rule that "require[s] the would-be applicant for postconviction relief to *ask leave of court* to file a second or other successive application for postconviction relief" is "condition to filing"), with *Smith v. Walls*, 276 F.3d 340, 344-45 (7th Cir. 2002) (because "Illinois does not require that a state prisoner obtain leave of court before filing a second or otherwise

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This Court also explained that a state court rule allowing a single application to contain both barred *and* non-barred claims is necessarily a "condition to obtaining relief" on claims, not a "condition to filing" the application. Any other conclusion

> would require judges to engage in verbal gymnastics when an application contains some claims that are procedurally barred and some that are not. Presumably a court would have to say that the application is "properly filed" *as to* the nonbarred claims, and not "properly filed" *as to* the rest. The statute, however, refers only to "properly filed" applications and does not contain the peculiar suggestion that a single application can be both "properly filed" and not "properly filed."

Artuz, 531 U.S. at 10 (emphasis in original).

This Court "express[ed] no view on the question whether the existence of certain exceptions to a [state court] timely filing requirement can prevent a late application from being considered improperly filed." *Artuz*, 531 U.S. at 8 n.2, citing *Smith v. Ward*, 209 F.3d 383, 385 (5th Cir. 2000). But the reasoning of *Artuz* compels the answer in Petitioner's case: an untimely PCRA petition is "properly filed" because the PCRA time limits work in *exactly the same way* as the state procedural bar rules at issue in *Artuz* – they are "conditions to obtaining relief" on claims, but they do *not* impose a "condition to filing" the PCRA petition.

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successive petition," its successive petition bar is a "condition to obtaining relief" and not a "condition to filing").

A Pennsylvania prisoner may file a PCRA petition at *any time* – there is no pre-condition or barrier to filing. When, as here, the petitioner files in the right court (*i.e.*, the Court of Common Pleas where the conviction was obtained, Pa.R.Cr.P. 1501), the PCRA petition must be accepted for filing and the "clerk of courts shall immediately docket the [petition] to the same term and number as the underlying conviction and sentence." Pa.R.Cr.P. 1503(a); *see also* 42 Pa.C.S. § 9545(a) ("Original jurisdiction over a proceeding under this subchapter shall be in the court of common pleas."). After docketing the PCRA petition, the clerk "shall thereafter transmit" the petition and the record to the original trial judge, if available, or to another judge specified by the Rules. Pa.R.Cr.P. 1503(a).

The judge may appoint counsel where, as here, the petitioner is indigent: for a first PCRA petition, appointment of counsel is mandatory, Pa.R.Cr.P. 1504(a); for a successive petition, the "judge shall appoint counsel" when "an evidentiary hearing is required" or "whenever the interests of justice require it," Pa.R.Cr.P. 1504(b)-(c). These rules apply even to petitions that are *facially untimely*: "Even though the timeliness requirements of the PCRA leave a court without jurisdiction to consider the merits of an untimely petition, they do not preclude a court from appointing counsel to aid an indigent petitioner in attempting to establish an exception to the time-bar." *Commonwealth v. Smith*, 818 A.2d 494, 499 (Pa. 2003).

The PCRA petition and the record are reviewed by the judge to determine if the petition was filed within one year after the conviction became final or, if not, if any claim

meets an exception to the one year limit.[15] The judge may hold a hearing and/or require briefing as part of the timeliness review or to determine if any claims meet an exception.[16]

The timeliness review is *claim-by-claim* – a PCRA petition filed outside the one year limit may contain both timely and untimely claims.[17]

[15] *See Smith*, 818 A.2d at 500 (PCRA court must "measure[ ] the facts against the provisions of section 9545(b), including the exceptions thereto" (quoting *Commonwealth v. Ferguson*, 722 A.2d 177, 178 (Pa.Super. 1998))); *Commonwealth v. Austin*, 721 A.2d 375, 377 (Pa.Super. 1998) (same); *Commonwealth v. Perry*, 716 A.2d 1259, 1260-61 (Pa.Super. 1998) ("[I]n order to determine if a PCRA petition is timely filed, we must conduct a thorough review under the amendments to § 9545. . . . [O]nly after the PCRA court reviews all three factors and decides that the petition is time-barred will it be divested of its authority to entertain the PCRA petition."); *see also* note 17, *infra* (describing state court review of PCRA claims for timeliness).

[16] *See Commonwealth v. Cruz*, 852 A.2d 287, 297 (Pa. 2004) (remanding for hearing on timeliness); *Commonwealth v. Breakiron*, 781 A.2d 94, 96 (Pa. 2001) (court held hearing on timeliness); *Commonwealth v. Abu-Jamal*, 833 A.2d 719, 723 (Pa. 2003) (court required briefing on timeliness).

[17] *See* 42 Pa.C.S. § 9545(b)(1)(i)-(iii) & (2) (inquiring separately about the timeliness of each "claim" raised or "right asserted," whenever the petition is filed outside the general one year period); *Commonwealth v. Lark*, 746 A.2d 585, 588-91 (Pa. 2000) (one claim timely; one claim assumed to be timely; several claims untimely); *Commonwealth v. Morris*, 822 A.2d 684, 695-99 (Pa. 2003) (reviewing "eleven claims separately" for timeliness; some claims held untimely, some decided on merits, one decided on procedural grounds other than time-bar); *Commonwealth v. Beasley*, 741 A.2d 1258, 1261 (Pa. 1999) (court "reviewed the numerous *issues* set forth in appellant's brief in an effort to ascertain whether any of those *issues* arguably fit within one or more of the exceptions" and concluded "that none of those *claims* meet the statutory requirements for exception"); *Commonwealth v. Yarris*, 731 A.2d 581, 587 (Pa. 1999) ("we have reviewed the seventeen broadly phrased issues raised by Appellant to determine whether they encompass any

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If the judge ultimately finds all the claims untimely and denies PCRA relief, the petitioner has an appeal as of right to the Superior Court.[18] The Superior Court may appoint counsel to brief time-bar and/or substantive issues. *See Commonwealth v. Thomas*, 718 A.2d 326, 327 n.6 (Pa.Super. 1998) (en banc). Appellate review of timeliness follows the same claim-by-claim approach as in the trial court. *See* note 17, *supra*. If the Superior Court ultimately holds all claims untimely, the petitioner has the right to pursue discretionary review in the Pennsylvania Supreme Court.[19]

All of this happened in Petitioner's case. Petitioner filed his *pro se* PCRA petition in the court where he was

claims that should be considered timely under one or more of the exceptions set forth in Section 9545(b)(1)"); *id.* at 591 (assuming one claim timely and reviewing it on merits); *Commonwealth v. Cross*, 726 A.2d 333, 335-37 (Pa. 1999) (one claim decided on merits; three claims untimely); *Abu-Jamal*, 833 A.2d at 726-27 (several claims held untimely; one claim assumed timely and denied on different procedural grounds); *Commonwealth v. Abdul-Salaam*, 812 A.2d 497, 502-04 (Pa. 2002) (one claim held untimely; other claims decided on merits and/or procedural grounds other than time-bar); *Commonwealth v. Breakiron*, 781 A.2d 94, 98-100 (Pa. 2001) (separately considering timeliness of each claim raised); *Commonwealth v. Crawley*, 739 A.2d 108, 110 (Pa. 1999) (same).

[18] *See Commonwealth v. Ferguson*, 722 A.2d 177, 178 (Pa.Super. 1998) (denying Commonwealth's motion to quash; "PCRA court's decision regarding whether a petition is time-barred is subject to appellate review"); *Commonwealth v. Austin*, 721 A.2d 375, 377 (Pa.Super. 1998) (same); *Commonwealth v. Perry*, 716 A.2d 1259, 1260-61 (Pa.Super. 1998) (same; "we must conduct a thorough review" of time-bar rulings).

[19] *See Commonwealth v. Cruz*, 852 A.2d 287 (Pa. 2004) (reversing Superior Court's time-bar ruling; remanding for hearing on timeliness); *Commonwealth v. Fenati*, 748 A.2d 205 (Pa. 2000) (reversing Superior Court's time-bar ruling).

convicted. The petition was docketed and transmitted, along with the record, to the original trial judge. The judge reviewed the petition and record, appointed counsel and gave counsel several months to brief the claims. The judge then reviewed the petition, record and counsel's submission, notified Petitioner that the court intended to deny relief, and gave Petitioner an opportunity to respond. Petitioner responded. The judge denied relief *without applying a time-bar* to any claim.

The judge notified Petitioner that he could appeal as of right. Petitioner appealed to the Superior Court, which set an ordinary briefing schedule, provided ordinary appellate review and denied relief *without quashing the appeal*, which the Commonwealth had requested. Petitioner sought the Pennsylvania Supreme Court's discretionary review in the same way that any other Pennsylvania litigant seeks such discretionary review.

To be sure, the Superior Court, unlike the trial court, denied Petitioner's claims as untimely. This outcome, however, does not alter the fact that Petitioner was permitted to file and litigate the claims in his petition, and was afforded judicial review.

The PCRA time-bar thus acts in all material respects like the procedural bar rules in *Artuz*. The PCRA time-bar does not impose any precondition on filing – a petitioner can file at any time. A petitioner who files in the right court gets judicial review, including ordinary appellate review. And "timeliness" *vel non* is decided on a *claim-by-claim* basis.

The only difference between Petitioner's case and *Artuz* is that the state procedural rule here is a "time limit." But *Artuz* did not draw a line between state court

time-bars and other types of state court procedural bar rules – it drew a line between "conditions to filing" and "conditions to obtaining relief." The PCRA time-bar is a "condition to obtaining relief" on *claims*, not a "condition to filing" the *petition*. Petitioner's PCRA petition was "properly filed." The District Court got it right. The Court of Appeals got it wrong.[20]

B. The Third Circuit's Definition of "Properly Filed" Is Unfair and Unworkable.

Because the statutory language of § 2244(d)(2) shows that the PCRA petition was "properly filed," there is no need to consider "policy arguments." *Artuz*, 53[illegible] S. at 10. Nevertheless, it is clear that the Third Circuit's definition of "properly filed" is unfair, inconsistent with the exhaustion requirement, and certain to trigger premature habeas filings.

[20] *Artuz* identifies "time limits on its delivery" as a "condition to filing" an application, *id.*, 531 U.S. at 8, and states that if "an application is erroneously accepted by the clerk of a court lacking jurisdiction, . . . it will be *pending*, but not *properly filed*," *id.* at 9 (emphasis in original). The PCRA does *not* impose time limits on "delivery" of a petition – a petition may be delivered to the court at any time and will be accepted for filing. And the clerk of court does not act "erroneously" when s/he accepts a PCRA petition that is ultimately deemed untimely (assuming it is the court in the county where the petitioner was convicted) – under the applicable rules, the clerk *must* accept the petition and transmit it and the record to the judge for review. While Pennsylvania's courts have attached a "jurisdictional" label to the PCRA time limits, "for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions, rather than the particular name that it bears." *Saffold*, 536 U.S. at 223.

The Third Circuit makes the "properly-filed"-or-not status of a state post-conviction proceeding depend entirely upon the state court's *ultimate ruling* – if the state court ultimately deems the claims timely, the proceedings were "properly filed" all along; if it ultimately deems the claims untimely, the proceedings were never "properly filed." A petitioner trying in good faith to exhaust state remedies may litigate in state court for years only to find out at the end that he was never "properly filed." Petitioners usually have little control over the time spent in state court and, thus, will not know that their state court proceedings failed to toll the AEDPA limitations period until it has already expired. Here, for example, Petitioner filed his PCRA petition in 1996; the trial court did not apply a time-bar; the Commonwealth first asserted a time-bar on appeal in 1998; and the state appellate court first applied a time-bar in 1998.

The Third Circuit thus turns "the complete exhaustion rule" into a "'trap [for] the unwary *pro se* prisoner,'" *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) (quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982)), denying the petitioner all access to the Great Writ because he did not correctly predict how the state courts ultimately would rule. This is especially unfair where, as here, state law makes it appear that the merits of the state court application may be entertained.

The Third Circuit's harsh approach to tolling provides no safety valve whatsoever. In the procedural default context, by contrast, a state court procedural bar ruling may inhibit federal review of individual claims, but *never bars all federal review*. Moreover, state procedural default rules do not bar federal merits review at all when the state court ruling is not based on an "adequate and independent

state ground" or when the petitioner can establish "cause and prejudice" or a "miscarriage of justice." *E.g.*, *Lee v. Kemna*, 534 U.S. 362 (2002). The Third Circuit's approach to "properly filed" does not allow such safety valves, offering no protection from unforeseeable or even arbitrary state court rulings: under Third Circuit law, if the state court applies a time-bar the federal court *must* hold the proceedings not "properly filed," no matter how unpredictable or onerous that state court ruling may be.

The Third Circuit recognizes that it "create[d] a tension" between AEDPA's time limits and "the need to exhaust state remedies" – it said a Pennsylvania petitioner could try to "ameliorate" this tension by filing a protective federal habeas petition and asking the federal court to hold proceedings in "suspense" during exhaustion of state remedies under the PCRA. *Merritt v. Blaine*, 326 F.3d 157, 170 n.10 (3d Cir. 2003). But when Petitioner was litigating his PCRA petition, the Third Circuit *did not allow* district courts to hold federal proceedings in "suspense" during exhaustion. Third Circuit law required that mixed habeas petitions be *dismissed*; this Circuit law was applied to Pennsylvania cases. *See Christy v. Horn*, 115 F.3d 201 (3d Cir. 1997); *Baker v. Horn*, 210 F.Supp.2d 592, 607 (E.D. Pa. 2002); *Crawley v. Horn*, 7 F.Supp.2d 587, 589 (E.D. Pa. 1998); *Williams v. Vaughn*, 1998 WL 238466, *2 n.3 (E.D. Pa.); subpart 3, *infra* (citing cases). The Third Circuit did not allow "suspense" until March 2004. *See Crews v. Horn*, 360 F.3d 146 (3d Cir. 2004).[21]

[21] This Court is considering the propriety of "suspense" in *Rhines v. Weber*, No. 03-9046.

Moreover, the Third Circuit's cumbersome approach runs afoul of "AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review." *Duncan v. Walker*, 533 U.S. 167, 181 (2001). In *Rose*, 455 U.S. at 520, this Court gave prisoners "a simple and clear instruction" – "before you bring any claims to federal court, be sure that you first have taken each one to state court." The Third Circuit turns this on its head, telling petitioners to file premature habeas petitions, burdening the federal courts with protective filings and creating the kind of "piecemeal litigation" that the exhaustion requirement and AEDPA were intended to avoid. *Duncan*, 533 U.S. at 180.

C. The Third Circuit Misapplied *Carey v. Saffold*.

The Third Circuit believes *Carey v. Saffold*, 536 U.S. 214 (2002) answered the "properly filed" question this Court reserved in *Artuz* by holding that an untimely state post-conviction petition is *per se* not "properly filed" under § 2244(d)(2). *See Merritt*, 326 F.3d at 166. The Third Circuit is wrong about *Saffold*.

Saffold says nothing whatsoever about the meaning of "properly filed." *Saffold* considered only whether state post-conviction proceedings were "pending" during a time-gap between the denial of an application in a lower court and the filing of a new, original application in a higher court under California's post-conviction review procedures. The *Saffold* opinion is very clear, from beginning to end, that it concerns only the meaning of "pending," *not* the meaning of "properly filed." *See Saffold*, 536 U.S. at 217 ("This case raises three questions related to the statutory

word '*pending*.'"); *id.* at 228 (Kennedy, J., dissenting) ("[T]he question in this case [is]: whether an application was *pending* in the 4-month period between the denial of respondent's habeas petition in the California Court of Appeal and his filing of a new petition in the California Supreme Court.").[22]

It is particularly odd for the Third Circuit to believe that *Saffold* decided the "properly filed" issue this Court reserved in *Artuz* – the *Saffold* opinion did not even cite *Artuz*.[23] The Third Circuit was wrong to think *Saffold* addressed whether a petition is "properly filed."

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[22] The Ninth Circuit, in the *Saffold* remand, confirmed that *Saffold* was about the meaning of "pending" during gaps in the state proceedings, not "properly filed." It held the state proceedings were "properly filed" despite being untimely under state law, because the California time limits, like Pennsylvania's, required the state courts to accept the petition and review it for timeliness – the state time limits thus were a "condition to obtaining relief," not a "condition to filing" under *Artuz*. *See Saffold v. Carey*, 312 F.3d 1031, 1035 (9th Cir. 2002), *cert. denied*, 539 U.S. 927 (2003). Other decisions are in accord. *E.g.*, *Chavis v. Lemarque*, 382 F.3d 921, 924-25 (9th Cir. 2004); *Jenkins v. Johnson*, 330 F.3d 1146, 1150-53 & n.3 (9th Cir. 2003) (*Saffold* "did not undermine" "either intentionally or by implication" cases holding that untimely state proceedings are properly filed, because *Saffold* did not address "properly filed" and, instead, "was making a limited point" about the meaning of "pending" under California's "unusual system"; *Saffold* "did not consider whether or not California's timeliness rule was a condition to filing or a condition to obtaining relief [*i.e.*, the 'properly filed' issue], as that issue was not before the Court."); *id.* at 1156 (O'Scannlain, J., dissenting) (same "properly filed" analysis). *Cf. Robertson v. Cain*, 324 F.3d 297, 302 (5th Cir. 2003) (*Smith v. Ward*'s "properly filed" analysis remains Fifth Circuit law post-*Saffold*); *see also* Statement of the Case § E (discussing *Smith v. Ward* and its application by the District Court here).

[23] The *Saffold* briefs also make clear that this Court was not addressing "properly filed." The Circuit's holding that the state court proceedings were "properly filed" even if untimely *was not challenged in*

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II. THE THIRD CIRCUIT WAS WRONG TO DENY PETITIONER EQUITABLE TOLLING AND FEDERAL REVIEW.

AEDPA's statute of limitations is subject to equitable tolling.[24] Here, state law and Third Circuit exhaustion law created a trap for Petitioner by making it appear that state post-conviction remedies were available for Petitioner to exhaust before filing in the federal habeas court. A petitioner so trapped should receive equitable tolling. Denial of tolling here is "an extraordinary deprivation of rights" and "patently unfair." JA462-463.

A. Third Circuit Exhaustion Law Required Petitioner to File His PCRA Petition.

When Petitioner filed his PCRA petition, the Third Circuit required Pennsylvania petitioners to seek PCRA relief "even if it is unlikely that the state court would consider the merits." *Doctor v. Walters*, 96 F.3d 675, 681 (3d Cir. 1996) (citing *Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir. 1993)); *accord Lambert v. Blackwell*, 134 F.3d 506, 517-18 (3d Cir. 1998) ("[U]nless a state court decision exists indicating that a habeas petitioner is *clearly* precluded from state court relief, the federal habeas claim

this Court. See Saffold v. Newland, 250 F.3d 1262, 1268 n.8 (9th Cir. 2001); *id.* at 1269 n.1 (O'Scannlain, J., dissenting). Instead, the parties debated whether anything was "pending" during gaps between state court proceedings.

[24] *See, e.g., Pliler v. Ford*, 124 S.Ct. 2441, 2447 (2004) (remanding for equitable tolling analysis); *id.* at 2448 (O'Connor, J., concurring); *id.* at 2448 (Stevens, J., joined by Souter, J., concurring in the judgment); *Duncan v. Walker*, 533 U.S. 167, 183-84 & n.1 (2001) (Stevens, J., joined by Souter, J., concurring in part and concurring in the judgment) (citing decisions from the Courts of Appeal).

should be dismissed for nonexhaustion, even if it appears unlikely that the state will address the merits of the petitioner's claim.") (emphasis in original). This Third Circuit exhaustion law applied to "[b]oth the legal theory and the facts on which a federal claim rests." *Gibson v. Scheidemantel*, 805 F.3d 135, 138 (3d Cir. 1986). As the District Court explained, this Third Circuit exhaustion law required Petitioner to seek the PCRA review he sought before filing his federal habeas petition.

1. Petitioner invoked statutory exceptions to the PCRA time-bar.

Petitioner invoked *statutory* exceptions to the PCRA time-bar under § 9545(b)(1)(i) and (ii). *See* Statement of the Case at 14 and 15. Consequently, if Petitioner had filed a federal habeas petition when he filed his PCRA petition, Third Circuit precedent would have required that the habeas petition be dismissed so state remedies could be exhausted.[25] Petitioner thus did what was required of him by Third Circuit exhaustion law.

[25] *See Gibson*, 805 F.3d at 139, 141 (when state post-conviction time limit contains exceptions, exhaustion required even when petitioner has "not explained in his presentation to [the federal habeas] court the reason for his failure to raise the [unexhausted] claim within the requisite [time]," and even when it is "unlikely that the [state] courts would reach the merits"); *Toulson*, 987 F.2d at 988-89 & n.8 (same); *Lambert*, 134 F.3d at 524 (requiring exhaustion under PCRA when there is a "possibility" that petitioner "may be able to plead and prove" one of the statutory exceptions under § 9545(b)); *Branca v. Pennsylvania Board of Probation & Parole*, 1996 WL 745532, *3 (E.D.Pa. Dec. 23, 1996) (requiring exhaustion where "claims do not clearly fall outside of the exceptions to [the PCRA one year] time period").

2. Pennsylvania decisional law made it appear that state post-conviction review was available irrespective of the PCRA's statutory exceptions.

Even if Petitioner had not invoked statutory exceptions to the PCRA time-bar, Third Circuit decisions would have required exhaustion because it was not clear at that time that the *statutory* PCRA exceptions would be the only ones the Pennsylvania courts allowed. Pennsylvania *decisional law* at the time of Petitioner's PCRA filing appeared to indicate that the Pennsylvania courts could consider his claims even if the claims did not satisfy a statutory exception. Pennsylvania's decisional law at the time did not treat PCRA statutory bar rules as the last word. Instead, Pennsylvania courts had established at least three ways by which a petitioner like Mr. Pace could overcome procedural default and receive merits review in a PCRA proceeding.

The first exception arose from the Pennsylvania "right to effective assistance of counsel" in state post-conviction proceedings at both "the hearing and appellate levels." *Commonwealth v. Albert*, 561 A.2d 736, 738 (Pa. 1989); *accord Commonwealth v. Albrecht*, 720 A.2d 693, 700 (Pa. 1998) (describing "enforceable right to effective post-conviction counsel"). When a prior post-conviction lawyer's "representation is . . . inadequate, it is inappropriate to allow the proceedings in which it was rendered to be binding upon the defendant's rights." *Albert*, 561 A.2d at 738. Thus, Pennsylvania's courts forgave default on a claim raised in successive post-conviction proceedings when the petitioner asserted that "all prior counsel,"

including prior post-conviction counsel, had provided ineffective assistance as to that claim.[26] Petitioner made such an ineffective-assistance-of-all-prior-counsel assertion as to the claims in his PCRA proceedings.

Second, Pennsylvania court decisions permitted merits review for claims raised in successive post-conviction

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[26] *See Commonwealth v. Morales*, 701 A.2d 516, 520 (Pa. 1997) (granting relief on claim first raised in successive post-conviction petition; "[A]ppellant could have raised all of his . . . claims on either direct appeal or in his first PCHA petition. Appellant, however, avoided waiving these claims in this PCRA petition by asserting that all of his prior counsel were ineffective for failing to previously raise them."); *Commonwealth v. Holloway*, 739 A.2d 1039, 1044 (Pa. 1999) ("Appellant manages to preserve his claims for relief by alleging, in a most perfunctory manner, that all of his prior counsel were ineffective for failing to raise the[m]."); *Commonwealth v. Rivera*, 816 A.2d 282, 288 (Pa.Super. 2003) (addressing claim first raised in successive post-conviction proceedings because petitioner "argues that his direct appeal counsel as well as his two previous PCRA attorneys rendered ineffective assistance by failing to preserve and raise this issue"); *Commonwealth v. Williams*, 814 A.2d 739, 741 (Pa.Super. 2002) (treating claims raised in second PCRA petition as if they had been raised in first petition "because Appellant's first petition was fatally defective in that Appellant was not afforded the competent assistance of counsel"); *Commonwealth v. McNeil*, 439 A.2d 664, 666 (Pa. 1981) (merits review of claims raised in second post-conviction petition because petitioner asserted ineffectiveness of all prior counsel for failing to raise the claims) (cited by Petitioner in his *pro se* PCRA submissions); *Commonwealth v. Bradley*, 480 A.2d 1205, 1206-07 (Pa.Super. 1984) (same); *Commonwealth v. Garrison*, 450 A.2d 65 (Pa.Super. 1982) (remanding for merits review on third post-conviction petition where petitioner alleged ineffective assistance of prior post-conviction counsel); *see also* Louis Natali, Jr., *New Bars in Pennsylvania Capital Post-Conviction Law and Their Implications for Federal Habeas Corpus Review*, 73 TEMPLE L. REV. 69, 91-92 (2000) (hereinafter "*New Bars*") (discussing this caselaw); Thomas Place, *The Claim Is Cognizable but the Petition Is Untimely: The Pennsylvania Supreme Court's Recent Collateral Relief Decisions*, 10 TEMP. POL. & CIV. RTS. L. REV. 49, 72-74 (2000) (hereinafter "*Claim Is Cognizable*") (same).

petitions, despite their being procedurally defaulted, when a "miscarriage of justice" may have occurred. Pennsylvania's courts used "miscarriage of justice" to allow merits review for a broad array of claims, including claims such as those raised by Petitioner in his PCRA proceedings.[27] Petitioner asserted a "miscarriage of justice" in his PCRA proceedings.

Third, "claims concerning the illegality of the sentence are not waivable" and "courts never relinquish their jurisdiction to correct an illegal sentence." *Commonwealth v. Vasquez*, 744 A.2d 1280, 1284 (Pa. 2000). Pennsylvania

[27] *See Commonwealth v. Lawson*, 549 A.2d 107, 112 (Pa. 1988); *id.* at 112 (Papadakos, J., concurring) ("'miscarriage of justice' is expressive of, and synonymous with, the standard of 'prejudice'" used in ineffective assistance of counsel claims); *Jermyn v. Horn*, 266 F.3d 257, 280 n.8 (3d Cir. 2001) (Pennsylvania miscarriage of justice standard "entails a merits analysis"); *Lambert*, 134 F.3d at 520-21 (discussing Pennsylvania miscarriage of justice review); *Commonwealth v. Allen*, 732 A.2d 582, 588-90 (Pa. 1999) (plea colloquy that does not adequately inform defendant of sentence is miscarriage of justice unless defendant has actual knowledge of sentence); *Commonwealth v. Moss*, 689 A.2d 259, 262 (Pa.Super. 1997) (illegal sentence is miscarriage of justice); *Commonwealth v. Williams*, 660 A.2d 614, 619 (Pa.Super. 1995) (claim that defendant "was promised a lesser sentence than the one which he received" establishes miscarriage of justice); *Commonwealth v. Huffman*, 638 A.2d 961, 963 (Pa. 1994) (miscarriage of justice where jury instruction relieved Commonwealth of burden to "prove all of the elements of a crime beyond a reasonable doubt"); *Commonwealth v. Bazemore*, 614 A.2d 684, 688 (Pa. 1992) (violation of confrontation rights is miscarriage of justice); *Commonwealth v. Williams*, 814 A.2d 739, 741 (Pa.Super. 2002) (miscarriage of justice where first PCRA counsel had a conflict of interest); *Commonwealth v. McFadden*, 587 A.2d 740, 742 (Pa.Super. 1991) (lack of jury instruction on self-defense is miscarriage of justice); *Commonwealth v. Hoyman*, 561 A.2d 756, 758-59 (Pa.Super. 1989) (counsel's failure to pursue requested appeal is miscarriage of justice); *New Bars* at 92 (discussing Pennsylvania's miscarriage of justice concept).

courts therefore reviewed illegal sentence claims that were "untimely" under statutory rules or raised in successive post-conviction proceedings.[28] Petitioner raised an illegal sentence claim in his PCRA proceedings.

These bar-overcoming approaches to review (ineffective assistance of all prior counsel, miscarriage of justice, illegality of sentence) were *court*-made. Thus, it was reasonable for a Pennsylvania petitioner to believe these court-made anti-bar rules would be applied to post-1996 PCRA statutory bars, such as the new time-bar, just as they had applied to pre-1996 PCRA statutory bars. Indeed, the Third Circuit itself held this view when Petitioner sought PCRA relief. *See* subpart 3, *infra*.

The Pennsylvania Supreme Court first applied the PCRA time-bar on December 21, 1998, over two years after Petitioner filed his PCRA petition. *See Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998).[29] *Peterkin* stated for the

[28] *See Vasquez*, 744 A.2d at 1283-84 (allowing untimely, jurisdictionally barred motion to modify illegal sentence); *Commonwealth v. Smith*, 598 A.2d 268, 270 (Pa. 1991) (allowing untimely motion to modify sentence); *Commonwealth v. Moss*, 689 A.2d 259, 262 (Pa.Super. 1997) (illegal sentence claims will be addressed in successive post-conviction proceedings); *Commonwealth v. Williams*, 660 A.2d 614, 618 (Pa.Super. 1995) (same); *Commonwealth v. Yount*, 615 A.2d 1316, 1317-18 (Pa.Super. 1992) (addressing illegal sentence claim raised in third post-conviction petition); *Commonwealth v. Staples*, 471 A.2d 847, 849-50 (Pa.Super. 1984) (same); *see also New Bars* at 93 (discussing illegal sentence bar-overcoming approach); *Claim Is Cognizable* at 74-75 (same).

[29] The Superior Court first used the PCRA time-bar on December 17, 1997, over a year after Petitioner filed his PCRA petition, in *Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa.Super. 1997), the case cited by the Commonwealth in its Superior Court brief in Petitioner's case, and in *Commonwealth v. Conway*, 706 A.2d 1243 (Pa.Super. 1997). It is noteworthy that *Conway* found claims untimely under the PCRA's

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first time that ineffective assistance of prior post-conviction counsel would not overcome the time-bar, *see id.*, 722 A.2d at 643 n.5, but did not address the miscarriage of justice or illegal sentence judicial exceptions to statutory procedural default. *Peterkin* stated, in passing and without analysis, that the time limits were "a matter of jurisdiction," *id.* at 641, but left open the possibility that non-statutory exceptions to the time-bar would be allowed

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statutory language but went on to "assume that [one of the claims] constitutes a *non-waivable challenge to the legality of the sentence*" that trumped the time-bar. *Id.*, 706 A.2d at 1244. Then, in June 1998, the Superior Court addressed time-barred claims on the merits so that "a decision on the constitutionality of [the time limits in] § 9545(b) was avoided." *Commonwealth v. Hall*, 713 A.2d 650, 651 (Pa.Super. 1998). In September 1998, the Superior Court held that the "prisoner mailbox rule" applies to PCRA filing times, and expressly rejected the Commonwealth's argument that only § 9545's *statutory* exceptions to the time limits should apply. *Commonwealth v. Little*, 716 A.2d 1287, 1289 (Pa.Super. 1998). Thus, Superior Court decisions had not foreclosed the application of Pennsylvania's judicial anti-bar rules to the PCRA time-bar.

Similarly, numerous Court of Common Pleas judges, from 1996-99, provided merits review to "untimely" PCRA petitions, as did the judge in Petitioner's case. *E.g.*, *Commonwealth v. Roman*, 730 A.2d 486, 487 (Pa.Super. 1999) (trial court granted relief on "untimely" PCRA petition filed in October 1997); *Commonwealth v. Lambert*, 765 A.2d 306, 316-17 (Pa.Super. 2000) (trial court held hearing and addressed claims on merits for "untimely" PCRA petition filed in February 1998); *Commonwealth v. Camps*, 772 A.2d 70, 72 (Pa.Super. 2001) (trial court appointed counsel and ruled on merits of "untimely" PCRA petition filed in January 1999); *Commonwealth v. Hutchins*, 760 A.2d 50, 52 (Pa.Super. 2000) (trial court held hearing and ruled on merits of "untimely" PCRA petition filed in March 1998); *Commonwealth v. Weimer*, 756 A.2d 684, 685 (Pa.Super. 2000) (trial court ruled on merits of "untimely" PCRA petition filed in May 1998); *Commonwealth v. DiVentura*, 734 A.2d 397, 398 (Pa.Super. 1999) (same for petition filed in October 1998); *Commonwealth v. DeHart*, 730 A.2d 991, 992 (Pa.Super. 1999) (same for petition filed in January 1997); *Commonwealth v. Austin*, 721 A.2d 375, 377 (Pa.Super. 1998) (same); *Commonwealth v. Perry*, 716 A.2d 1259, 1260-61 (Pa.Super. 1998) (same for petition filed in December 1996).

in "extraordinary situations" and "under principles of equitable tolling," *id.* at 643 n.7, citing *Commonwealth v. Stock*, 679 A.2d 760 (Pa. 1996) (allowing untimely appeal). *Stock* (at 673-74) had cited *Commonwealth v. Hoyman*, 561 A.2d 756 (Pa.Super. 1989), which *applied the "miscarriage of justice"* standard to grant relief on a successive post-conviction petition, *id.* at 758, and *Commonwealth v. Miranda*, 442 A.2d 1133 (Pa.Super. 1982), which held that *"illegality of sentence is not a waivable issue," id.* at 1142 n.17, as examples of cases with "extraordinary" situations.

Two months after *Peterkin*, on February 25, 1999, the Pennsylvania Supreme Court again stated that the time limits are "jurisdictional," but *addressed a time-barred PCRA claim on the merits*, with no suggestion that it fit into a statutory exception to bar, because the Third Circuit had recently granted relief on a similar claim. *See Commonwealth v. Cross*, 726 A.2d 333, 336-38 (Pa. 1999). In March and May, 1999, the Pennsylvania Supreme Court applied the time-bar, but did not reject – or even address – the miscarriage of justice or illegal sentence judicial exceptions to bar. *See Commonwealth v. Banks*, 726 A.2d 374 (Pa. 1999); *Commonwealth v. Yarris*, 731 A.2d 581 (Pa. 1999).

On August 27, 1999, the Pennsylvania Supreme Court applied the time-bar to a fourth post-conviction petition and held for the first time that neither a miscarriage of justice, nor an illegal sentence, nor any other non-statutory consideration, can overcome the PCRA time-bar. *Commonwealth v. Fahy*, 737 A.2d 214, 223 (Pa. 1999).

After *Fahy*, it was clear that the state courts would not address Petitioner's claims on the merits.[30] But this clarification came long *after* Petitioner's November 1996 PCRA filing. Indeed, it came one month *after* the Pennsylvania Supreme Court had already denied review in the 1999 appeal in Petitioner's PCRA case.

3. Third Circuit exhaustion law, requiring exhaustion in the Pennsylvania courts, created a trap for Petitioner.

In 1996, shortly before Petitioner filed his PCRA petition, the Third Circuit held in *Doctor v. Walters*, 96 F.3d 675 (3d Cir. 1996) that PCRA remedies might be available even though Doctor's claims were barred by PCRA statutory procedural default rules, because Doctor "may be able to demonstrate a miscarriage of justice [as defined in Pennsylvania] warranting departure from the

[30] *See Lambert*, 765 A.2d at 322-23 (noting that before the August 1999 *Fahy* decision, prisoners and the Third Circuit believed the PCRA time-bar might be subject to exceptions other than those in the statute); *Claim is Cognizable* at 74 ("In holding that illegal sentence claims are time-barred if not presented within the one year filing period, the [Pennsylvania Supreme] Court in *Fahy ignores settled precedent*"); *id.* at 81 ("Neither the language, structure, nor legislative history of the [time-bar] amendments to the PCRA suggest that the legislature intended the filing period to act as a jurisdictional bar."); *id.* at 69-71 (same); *id.* at 71 (even if Pennsylvania Supreme Court was correct to deem the time limits "jurisdictional, there is a substantial body of case law in Pennsylvania holding that time limits that are jurisdictional are subject to equitable exceptions"); *Banks v. Horn*, 271 F.3d 527, 534 (3d Cir. 2001) (before 1999 *Commonwealth v. Banks* decision, petitioners "could reasonably have viewed the state time limit as a mere statute of limitations . . . , not . . . a jurisdictional requirement").

PCRA's stringent eligibility requirements." *Id.*, 96 F.3d at 681-82 (internal quotation marks omitted).[31]

In *Banks v. Horn*, 126 F.3d 206 (3d Cir. 1997), decided while Petitioner was appealing to the Superior Court, the Third Circuit held PCRA remedies might be available even though Banks' claims were facially time-barred under the PCRA. Because the Pennsylvania Supreme Court had not yet applied the statutory time-bar and it was unclear how the Pennsylvania Supreme Court would apply it, the Third Circuit required exhaustion in the Pennsylvania Courts. *Id.* at 213-14.[32]

In *Lambert v. Blackwell*, 134 F.3d 506 (3d Cir. 1998), the Third Circuit required exhaustion notwithstanding that the claims might be barred by the PCRA's statutory language, including the time-bar. The Third Circuit stated

[31] *Doctor* was decided on September 24, 1996, and rehearing was denied on November 4, 1996. Petitioner filed his PCRA petition in November 1996. *Doctor* did not explicitly discuss the PCRA time-bar, but it was considering the post-January 16, 1996 PCRA which contains the time-bar. *See id.*, 96 F.3d at 681; *Lambert*, 134 F.3d at 521 n.26 (in *Doctor*, "we were construing the PCRA as amended in 1995 [effective January 16, 1996], as evidenced by our citation to the 1996 supplement and the language of the statute as amended").

[32] Petitioner noticed his appeal to the Superior Court in August 1997, and filed his brief in April 1998. *Banks* was decided on September 19, 1997. Because *Banks* was a capital case, the Third Circuit focused on the capital case "relaxed waiver" rule, *see New Bars* at 86-91, as a source of state law uncertainty. The Third Circuit's conclusion that PCRA review might be available, however, applied to both capital and non-capital cases. *See Banks*, 126 F.3d at 214 n.3 ("It is, of course, possible in death penalty cases (and *other cases as well*) that *future experience* will show that the Pennsylvania Supreme Court consistently and regularly applies the [PCRA time limits]. . . . *That time, however, has not yet been reached.*"). *Banks* has a complex subsequent history, *see, e.g.*, *Beard v. Banks*, 124 S.Ct. 2504 (2004), which is not relevant to Petitioner's case.

that under a "literal reading of section 9545" (the PCRA time-bar) as well as the PCRA's "waiver" provisions, the claims were untimely and otherwise barred. *Id.*, 134 F.3d at 524. However, "Pennsylvania's courts have expressed a willingness to depart from the PCRA's stringent waiver standards, for non-capital, as well as capital cases," *id.* at 521, and Pennsylvania courts have been "lenient in allowing collateral review after long delays," *id.* at 524 n.33, in cases of miscarriage of justice, "manifest injustice," or ineffective assistance of counsel.[33] The Third Circuit explained that Pennsylvania's courts had not "decide[d] under what circumstances [they] would excuse an untimely PCRA petition under the new statute of limitations provision," and exhaustion therefore was not futile. *Id.* at 524.[34]

Relying on the Third Circuit's decisions, District Courts in Pennsylvania made similar rulings from 1996-99, requiring Pennsylvania prisoners to pursue exhaustion with facially untimely and otherwise statutorily barred PCRA petitions.[35]

[33] *See id.* at 520, 522 ("miscarriage of justice"); *id.* at 521 ("manifest injustice"); *id.* at 522 n.27 ("[T]he Commonwealth acknowledged in its letter brief . . . Pennsylvania decisional law holding that 'PCRA courts will consider claims which otherwise would be deemed waived when raised under the rubric of ineffective assistance of counsel' "); *id.* at 524 n.33 ("Pennsylvania courts were lenient in allowing collateral review after long delays, especially in situations involving ineffective assistance of counsel.").

[34] Petitioner was appealing the denial of PCRA relief when *Lambert* was decided.

[35] *E.g.*, *Weakland v. White*, 1997 WL 799433, *3 (E.D. Pa. Dec. 29, 1997) (requiring exhaustion with facially untimely second PCRA petition because time-bar "may be waived by Pennsylvania courts" under the miscarriage of justice standard); *Belle v. Stepanik*, 1996 WL

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On March 21, 2000, after Petitioner's state court litigation was completed and his federal habeas petition had been filed, the Third Circuit held *for the first time* that the PCRA time limits made exhaustion futile where the petitioner had not asserted a statutory exception under § 9545(b)(1)(i)-(iii). *See Lines v. Larkins*, 208 F.3d 153, 163-66 (3d Cir. 2000). Lines did not claim a miscarriage of justice or illegal sentence. The only argument for allowing a second PCRA petition was the ineffectiveness of first PCRA counsel. However, now (in 2000) it was clear that such an assertion would not overcome the PCRA time-bar, and that the Pennsylvania courts would not allow any

663872, *4-*8 & n.5 (E.D. Pa. Nov. 14, 1996) (requiring exhaustion with facially untimely second PCRA petition; because "miscarriage of justice" law was not based on PCRA's statutory language, the January 16, 1996 PCRA "amendments probably do not eliminate the . . . miscarriage of justice exception"); *Blasi v. Attorney General*, 30 F.Supp.2d 481, 488 (E.D. Pa. Dec. 17, 1998) (requiring exhaustion in second PCRA petition because "ineffective assistance of [prior] PCRA counsel" might "permit[ ] review"); *Williams v. Vaughn*, 3 F.Supp.2d 567, 573-74 (E.D. Pa. March 18, 1998) (requiring exhaustion in facially untimely second PCRA petition because there is "a lack of certainty with respect to state application of this [time-]bar" (citing *Doctor*, *Lambert*, *Banks*)); *Morris v. Horn*, 1998 WL 150956, *2-*3 (E.D. Pa. March 19, 1998) (same); *Peterson v. Brennan*, 1998 WL 470139, *5-*6 (E.D. Pa. Aug. 11, 1998) (same); *Fidtler v. Gillis*, 1999 WL 450337, *4-*6 (E.D. Pa. June 29, 1999) (same), *vacated on reconsideration*, 1999 WL 596940 (E.D. Pa. Aug. 9, 1999); *Hammock v. Vaughn*, 1998 WL 163194, *5-*6 (E.D. Pa. April 7, 1998) (same for fourth post-conviction petition); *Crawley v. Horn*, 7 F.Supp.2d 587, 588 (E.D. Pa. June 11, 1998) (requiring exhaustion in facially untimely second PCRA petition where "at least one apparently unexhausted claim may satisfy the miscarriage of justice exception"); *see also Peterkin v. Horn*, 30 F.Supp.2d 513, 520 (E.D. Pa. Dec. 15, 1998) ("[I]t is virtually impossible for this Court to definitively predict if the Pennsylvania state courts would entertain Petitioner's [facially untimely claims] and if so, what the outcome of that petition would be.").

grace period for second petitions, even if the first state post-conviction petition had been filed before the 1996 time-bar amendments. *Id.*, 208 F.3d at 164-165 & n.17; *cf.* JA449, JA521-522 (District Court in *Pace* notes uncertainty about availability of grace period when Petitioner litigated his PCRA petition).

Petitioner relied on the same Pennsylvania judicial law as the Third Circuit and its District Courts when he sought PCRA review to exhaust all of his claims before proceeding to federal court. Petitioner cannot be required to foretell the future better than the Third Circuit or its District Courts.[36]

B. It Is Patently Unfair to Deny Equitable Tolling in this Case.

When Petitioner filed his PCRA petition in November 1996, and continuing until the Pennsylvania Supreme Court's *Fahy* decision in August 1999, the Pennsylvania

[36] The Circuit suggested in *Pace*, JA537-538 & n.1, that the applicability of the PCRA time-bar became clear in December 1997, when Superior Court panels decided *Alcorn* and *Conway*. *See* note 29, *supra* (discussing *Alcorn*, *Conway*). As decisions of Pennsylvania's intermediate appellate court, *Alcorn* and *Conway* could not make state law clear, since they were not the last word on questions of state law. The Pennsylvania Supreme Court had not abandoned the judicial exceptions at the time of *Alcorn* and *Conway*. Indeed, any suggestion that *Alcorn* and *Conway* made state law clear is contrary to Third Circuit and District Court exhaustion decisions, post-dating *Alcorn* and *Conway*, requiring petitioners such as Mr. Pace to seek PCRA remedies. Finally, even if *Alcorn* and *Conway* had made state law clear, Petitioner started the exhaustion process long before they were decided, and had to present his claims to all levels of the state courts to avoid a federal court procedural default ruling. *See O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

Supreme Court had not swept aside the judicial exceptions to statutory default. Those judicial exceptions could have trumped the PCRA time-bar, as they traditionally had trumped other procedural bars in the PCRA statute. Petitioner's application for Pennsylvania Supreme Court review was denied in July 1999, one month *before Fahy was issued*.

Petitioner relied upon the same state law that the Third Circuit relied upon at a time when Third Circuit law required him to exhaust by pursuing PCRA relief in the Pennsylvania courts. Indeed, the District Court here found that a federal habeas petition "would have been dismissed" and Petitioner would have been required to do what he did do – file a PCRA petition to exhaust state remedies before seeking federal review. JA461, JA527.

The exhaustion requirement is meant to encourage state court review, not prevent federal relief. *Rose*, 455 U.S. at 519-22. Exhaustion must not be used to "trap the unwary *pro se* petitioner." *Rose*, 455 U.S. at 520; *Slack*, 529 U.S. at 487. As this Court has stated, it is "perverse" to allow the exhaustion requirement to "bar the prisoner from ever obtaining federal habeas review." *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998). After all, "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar*

v. Thomas, 517 U.S. 314, 324 (1996) (emphasis omitted). Equitable tolling is appropriate here.[37]

CONCLUSION

Petitioner was seventeen years old when he was sentenced to life without parole in proceedings he has challenged as unconstitutionally defective. The District Court found he "diligently and reasonably" asserted his claims for relief, JA528, and that denying him federal review would be "an extraordinary deprivation of rights" and "patently unfair," JA462-463. The Third Circuit was wrong to deny federal review. This Court should hold statutory tolling appropriate in light of *Artuz*. This Court should hold equitable tolling appropriate in light of the circumstances of this case.

[37] In *Artuz*, even the *state* agreed that tolling is appropriate under circumstances such as those presented here. *See Artuz v. Bennett*, No. 99-1238, Petitioner's Brief, 2000 WL 821138, *32-*34 (U.S. June 22, 2000) ("[A] petitioner who files a state post-conviction application with an arguably valid contention that a state court might overlook the procedural bar need not fear the statute of limitations. . . . Any legitimate or even arguably legitimate attempt to exhaust state remedies will result in tolling."). In other contexts, federal courts have allowed equitable tolling under similar circumstances. *E.g.*, *Burnett v. New York Central R. Co.*, 380 U.S. 424, 430 (1965) (equitable tolling to avoid "unfairness of barring . . . action solely because a prior timely action is dismissed for improper venue after the applicable statute of limitations has run"); *Clymore v. United States*, 217 F.3d 370, 376 (5th Cir. 2000) (equitable tolling where litigant filed in wrong venue and statute of limitations expired during wrong venue litigation; "Given (1) the uncertainty of the law regarding the proper venue in which to file and (2) the government's awareness [that Clymore was seeking relief], the limitations period should be equitably tolled."); *Doherty v. Teamsters Pension Trust Fund*, 16 F.3d 1386, 1393 n.7 (3d Cir. 1994) (when there are "uncertainties about the law" regarding forum where claims should be filed, equitable tolling avoids "penaliz[ing] litigants for having made questionable procedural choices of fora" (citation omitted)); *Husch v. Szabo Food Service Co.*, 851 F.2d 999, 1003-04 (7th Cir. 1988) (equitable tolling where plaintiff filed claims in wrong forum because of "confusing" law); *Walck v. Discavage*, 741 F.Supp. 88, 91 (E.D. Pa. 1990) (equitable tolling where plaintiff filed in court that lacked jurisdiction, but there was a "reasonable legal theory for invoking the jurisdiction of that court" (citations omitted)).

Respectfully submitted,

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28 U.S.C. § 2244(d), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such in view;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection

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42 Pa.C.S. § 9544 (West 2004)

§ 9544. Previous litigation and waiver

(a) Previous litigation. – For purposes of this subchapter, an issue has been previously litigated if:

(1) Deleted.

(2) the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue; or

(3) it has been raised and decided in a proceeding collaterally attacking the conviction or sentence.

(b) Issues waived. – For purposes of this subchapter, an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.

1982, May 13, P.L. 417, No. 122, § 2, imd. effective. Amended 1988, April 13, P.L. 336, No. 47, § 3, imd. effective; 1995, Nov. 17, P.L. 1118, No. 32 (Spec. Sess. No. 1), § 1, effective in 60 days.

Suspended

Subsection (b) of this section is suspended permanently only insofar as it references "unitary review" by order of the Supreme Court dated August 11, 1997, effective immediately.

The 1997 order further provides that it shall apply retroactively to all cases in which the death penalty was imposed on or after January 1, 1996 and that appointments of counsel made pursuant to the Capital Unitary Review Act shall remain in

effect for purposes of challenges under the Post Conviction Relief Act (as amended in 1995 and by the 1997 order), and under Chapter 1500 (as amended by the 1997 order).

Historical and Statutory Notes

The 1988 amendment rewrote the section and the heading.

Section 6 of Act 1988, April 13, P.L. 336, No. 47, provides that the amendment to this section shall apply to all actions for collateral relief, whether statutory or common law, instituted on or after the effective date of this act, irrespective of the date of conviction or sentence.

The 1995 amendment rewrote this section, which formerly read:

"(a) Previous litigation. – For the purpose of this subchapter, an issue has been previously litigated if:

"(1) it has been raised in the trial court, the trial court has ruled on the merits of the issue and the petitioner did not appeal;

"(2) the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue; or

"(3) it has been raised and decided in a proceeding collaterally attacking the conviction or sentence.

"(b) Issues waived. – For the purposes of this subchapter, an issue is waived if the petitioner failed to raise it and if it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or other

proceeding actually conducted or in a prior proceeding actually initiated under this subchapter."

Section 3(1) of Act 1995 (Spec. Sess. No. 1), Nov. 17, P.L. 1118, No. 32 provides that the amendment of 42 Pa.C.S. §§ 9542, 9543, 9544, 9545 and 9546 shall apply to petitions filed after the effective date of this act; however, a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition under 42 Pa.C.S. Ch. 95 Subch. B if the petitioner's first petition is filed within one year of the effective date of this act.

Prior Laws:

1966, Jan. 25; P.L. (1965) 1580, No 554, § 4 (19 P.S. § 1180-4).

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42 Pa.C.S. § 9545 (West 2004)

§ 9545. Jurisdiction and proceedings

(a) Original jurisdiction. – Original jurisdiction over a proceeding under this subchapter shall be in the court of common pleas. No court shall have authority to entertain a request for any form of relief in anticipation of the filing of a petition under this subchapter.

(b) Time for filing petition. –

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

(4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained.

(c) Stay of execution. –

(1) No court shall have the authority to issue a stay of execution in any case except as allowed under this subchapter.

(2) Except for first petitions filed under this subchapter by defendants whose sentences have been affirmed on direct appeal by the Supreme Court of Pennsylvania between January 1, 1994, and January 1, 1996, no stay may be issued unless a petition for postconviction relief which meets all the requirements of this subchapter has been filed and is pending and the petitioner makes a strong showing of likelihood of success on the merits.

(3) If a stay of execution is granted, all limitations periods set forth under sections 9574 (relating to answer to petition), 9575 (relating to disposition without evidentiary hearing) and 9576 (relating to evidentiary hearing) shall apply to the litigation of the petition.

(d) Evidentiary hearing. –

(1) Where a petitioner requests an evidentiary hearing, the petition shall include a signed certification as to each intended witness stating the witness's name, address, date of birth and substance of

testimony and shall include any documents material to that witness's testimony. Failure to substantially comply with the requirements of this paragraph shall render the proposed witness's testimony inadmissible.

(2) No discovery, at any stage of proceedings under this subchapter, shall be permitted except upon leave of court with a showing of exceptional circumstances.

(3) When a claim for relief is based on an allegation of ineffective assistance of counsel as a ground for relief, any privilege concerning counsel's representation as to that issue shall be automatically terminated.

1982, May 13, P.L. 417, No. 122, § 2, imd. effective. Amended 1988, April 13, P.L. 336, No. 47, § 3, imd. effective; 1995, Nov. 17, P.L. 1118, No. 32 (Spec. Sess. No. 1), § 1, effective in 60 days.

Suspended

Subsections (c)(3) and (d)(2) of this section are suspended permanently by order of the Supreme Court dated August 11, 1997, effective immediately.

The 1997 order further provides that it shall apply retroactively to all cases in which the death penalty was imposed on or after January 1, 1996 and that appointments of counsel made pursuant to the Capital Unitary Review Act shall remain in effect for purposes of challenges under the Post Conviction Relief Act (as amended in 1995 and by the 1997 order), and under Chapter 1500 (as amended by the 1997 order).

Historical and Statutory Notes

The 1988 amendment rewrote the section and the heading.

Section 6 of Act 1988, April 13, P.L. 336, No. 47, provides that the amendment to this section shall apply to all actions for collateral relief, whether statutory or common law, instituted on or after the effective date of this act, irrespective of the date of conviction or sentence.

The 1995 amendment rewrote this section, which formerly read:

"(a) Original jurisdiction. – Original jurisdiction over a proceeding under this subchapter shall be in the court in which the conviction was obtained.

"(b) Rules governing proceedings. – The Supreme Court may, by general rule, prescribe procedures to implement the action established under this subchapter but shall not expand, contract or modify the grounds for relief set forth in this subchapter."

Section 3(1) of Act 1995 (Spec. Sess. No. 1), Nov. 17, P.L. 1118, No. 32 provides that the amendment of 42 Pa.C.S. §§ 9542, 9543, 9544, 9545 and 9546 shall apply to petitions filed after the effective date of this act; however, a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition under 42 Pa.C.S. Ch. 95 Subch. B if the petitioner's first petition is filed within one year of the effective date of this act.

Prior Laws:

1970, Nov. 25, P.L. 759, No. 249, § 1.
1966, Jan. 25, P.L. (1965) 1580, No. 554, § 5 (19 P.S. § 1180-5).

Pennsylvania Rules of Criminal Procedure 1501-1509 (West 1997)

CHAPTER 1500. POST-CONVICTION COLLATERAL PROCEEDINGS

RULE 1501. INITIATION OF POST-CONVICTION COLLATERAL PROCEEDINGS

A proceeding for post-conviction collateral relief shall be initiated by filing a motion and 3 copies with the clerk of the court in which the defendant was convicted and sentenced. The motion shall be verified by the defendant.

Note: Previous Rule 1501 adopted January 24, 1968, effective August 1, 1968; amended November 25, 1968, effective February 3, 1969; amended February 15, 1974, effective immediately; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded November 9, 1984, effective January 2, 1985. Former Rule 1501 adopted November 9, 1984, effective January 2, 1985; rescinded February 1, 1989, effective July 1, 1989, and replaced by present Rule 1502. Present Rule 1501 adopted February 1, 1989, effective July 1, 1989; amended March 22, 1993, effective January 1, 1994.

Comment

The rules in Chapter 1500 govern proceedings to obtain relief authorized by the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541 et seq.

The motion for post-conviction relief under these rules is not intended to be a substitute for or a limitation on the availability of appeal or a post-sentence motion. *See* Pa.R.Crim.P. 320 and 1410. Rather, the Chapter 1500 Rules are intended to require that, in a single proceeding,

the defendant must raise and the judge must dispose of all grounds for relief available *after* conviction and exhaustion of the appellate process, either by affirmance or by the failure to take a timely appeal.

As used in the Chapter 1500 Rules, "motion for post-conviction collateral relief" and "motion" are intended to include an amended motion filed pursuant to Rule 1505, except where the context indicates otherwise.

RULE 1502. CONTENT OF MOTION FOR POST-CONVICTION COLLATERAL RELIEF

(a) A motion for post-conviction collateral relief shall bear the caption, number, and court term of the case or cases in which relief is requested and shall contain substantially the following information:

(1) the name of the defendant;

(2) the place where the defendant is confined, or if not confined, the defendant's current address;

(3) the offenses for which the defendant was convicted and sentenced;

(4) the date on which the defendant was sentenced;

(5) whether the defendant was convicted by a jury, by a judge without jury, on a plea of guilty, or on a plea of nolo contendere;

(6) the sentence imposed and whether the defendant is now serving or waiting to serve that sentence;

(7) the name of the judge who presided at trial or plea and imposed sentence;

(8) the court, caption, term, and number of any proceeding (including appeals and federal court proceedings) instituted by the defendant to obtain relief from conviction or sentence, specifying whether a proceeding is pending or has been completed;

(9) the name of each lawyer who represented the defendant at any time after arrest, and the stage of the case at which each represented the defendant;

(10) the relief requested;

(11) the grounds for the relief requested;

(12) the facts supporting each such ground that:

(i) appear in the record, and the place in the record where they appear; and

(ii) do not appear in the record, and an identification of any affidavits, documents, and other evidence showing such facts;

(13) whether any of the grounds for the relief requested were raised before, and if so, at what stage of the case; and

(14) a verification by the defendant that the facts set forth in the motion are true and correct to the best of the defendant's personal knowledge or information and belief and that any false statements therein are made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.S. § 4904), relating to unsworn falsification to authorities.

The motion may, but need not, include concise argument or citation and discussion of authorities.

(b) Each ground relied upon in support of the relief requested shall be stated in the motion. Failure to state such a ground in the motion shall preclude the defendant from raising that ground in any subsequent proceeding for post-conviction collateral relief under these rules.

(c) The defendant shall state in the motion the name and address of the attorney who will represent the defendant in the post-conviction collateral proceeding. If the defendant is unable to afford or otherwise procure counsel, and wants counsel appointed, the defendant shall so state in the motion and shall request the appointment of counsel.

(d) The defendant shall attach to the motion any affidavits, records, documents, or other evidence which show the facts stated in support of the grounds for relief, or the motion shall state why they are not attached.

Note: Previous Rule 1502 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by present Rules 1503 and 1505. Present Rule 1502 adopted February 1, 1989, effective July 1, 1989.

Comment

This rule is derived from former Rule 1501.

Pursuant to paragraph (a)(6), the motion should include specific information about the sentence imposed, including the minimum and maximum terms of the sentence, the amount of fine, if any, and whether the defendant is released on probation or parole. *See also*,

Section 9543(a) of the Post Conviction Relief Act, 42 Pa.C.S. § 9543(a) (Supp.1988).

Section 9543(a)(2), (3), and (4) of the Post Conviction Relief Act (42 Pa.C.S. § 9543(a)(2), (3) and (4) (Supp.1988)) requires that to be eligible for relief, the defendant must plead and prove by a preponderance of the evidence the following:

1. "That the conviction or sentence resulted from one or more of the following:

(I) A violation of the constitution of Pennsylvania or laws of this Commonwealth or the constitution of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(II) Ineffective assistance of counsel which, in the circumstance of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(III) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused an individual to plead guilty.

(IV) The improper obstruction by Commonwealth officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(V) A violation of the provisions of the constitution, law or treaties of the United States which would require the granting of federal habeas corpus relief to a state prisoner.

(VI) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of the trial if it had been introduced.

(VII) The imposition of a sentence greater than the lawful maximum.

(VIII) A proceeding in a tribunal without jurisdiction."

2. "That the allegation of error has not been previously litigated and one of the following applies:

(I) The allegation of error has not been waived.

(II) If the allegation of error has been waived, the alleged error has resulted in the conviction or affirmance of sentence of an innocent individual.

(III) If the allegation of error has been waived, the waiver of the allegation of error during pretrial trial, post-trial or direct appeal proceedings does not constitute a state procedural default barring federal habeas corpus relief."

3. "That the failure to litigate the issue prior to or during trial or on direct appeal could not have been the result of any rational strategic or tactical decision by counsel."

It is expected that a form motion will be prepared incorporating the required contents set forth herein which will be available for distribution to uncounseled defendants. This rule is not intended to require an attorney to use a printed form or any other particular format in preparing a motion or an amended motion for post-conviction collateral

relief, provided, of course, that the attorney must include in a motion or amended motion substantially all of the information set forth in this rule.

The motion should be typewritten or legibly handwritten.

RULE 1503. DOCKETING AND ASSIGNMENT

(a) Upon receipt of a motion for post-conviction collateral relief, the clerk of courts shall immediately docket the motion to the same term and number as the underlying conviction and sentence. The clerk shall thereafter transmit the motion and the record to the trial judge, if available, or to the administrative judge, if the trial judge is not available. If the defendant's confinement is by virtue of multiple indictments or informations and sentences, the case shall be docketed to the same term and number as the indictment or information upon which the first unexpired term was imposed, but the court may take judicial notice of all proceedings related to the multiple indictments or informations.

(b) When the motion is filed and docketed, the clerk shall transmit a copy of the motion to the attorney for the Commonwealth.

(c) The trial judge, if available, shall proceed with and dispose of the motion in accordance with these rules, unless the judge determines, in the interests of justice, that he or she should be disqualified.

(d) When the trial judge is unavailable or disqualified, the administrative judge shall promptly assign and transmit the motion and the record to another judge, who

shall proceed with and dispose of the motion in accordance with these rules.

Note: Previous Rule 1503 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by present Rule 1504. Present Rule 1503 adopted February 1, 1989, effective July 1, 1989; amended June 19, 1996, effective July 1, 1996.

Comment

As used in this rule, "trial judge" is intended to include the judge who accepted a plea of guilty or nolo contendere.

The transmittal of the motion to the attorney for the Commonwealth does not require a response unless one is ordered by the judge as provided in these rules.

Although most references to indictments and indicting grand juries were deleted from these rules in 1993 since the indicting grand jury had been abolished in all counties, see PA. CONST. art. I, § 10 and 42 Pa.C.S. § 8931(b), the reference was retained in this rule because there may be some cases still pending that were instituted prior to the abolition of the indicting grand jury.

RULE 1504. APPOINTMENT OF COUNSEL; FORMA PAUPERIS

(a) When an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, the judge shall appoint counsel to

represent the defendant on the defendant's first motion for post-conviction collateral relief.

(b) On a second or subsequent motion, when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, and an evidentiary hearing is required as provided in Rule 1508, the judge shall appoint counsel to represent the defendant.

(c) The judge shall appoint counsel to represent a defendant whenever the interests of justice require it.

(d) An appointment of counsel shall be effective throughout the post-conviction proceedings, including any appeal from disposition of the motion for post-conviction collateral relief.

(e) When a defendant satisfies the judge that the defendant is unable to pay the costs of the post-conviction collateral proceedings, the judge shall order that the defendant be permitted to proceed in forma pauperis.

Note: Previous Rule 1504 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by Rule 1507. Present Rule 1504 adopted February 1, 1989, effective July 1, 1989.

Comment

This rule replaces former Rule 1503.

If a defendant seeks to proceed without an attorney, the court may appoint standby counsel. *See* Rule 318.

Consistent with Pennsylvania post-conviction practice under former Rules 1503 and 1504, it is intended that counsel be appointed in every case in which a defendant has filed a motion for post-conviction collateral relief for the first time and is unable to afford counsel or otherwise procure counsel. However, the rule now limits appointment of counsel on second or subsequent motions so that counsel should be appointed *only* if the judge determines that an evidentiary hearing is required. Of course, the judge has discretion to appoint counsel in any case when the interests of justice require it.

RULE 1505. AMENDMENT AND WITHDRAWAL OF MOTION FOR POST-CONVICTION COLLATERAL RELIEF

(a) The judge may grant leave to amend or withdraw a motion for post-conviction collateral relief at any time. Amendment shall be freely allowed to achieve substantial justice.

(b) When a motion for post-conviction collateral relief is defective as originally filed, the judge shall order amendment of the motion, indicate the nature of the defects, and specify the time within which an amended motion shall be filed. If the order directing amendment is not complied with, the motion may be dismissed without a hearing.

(c) Upon the entry of an order directing an amendment, the clerk of court shall serve a copy of the order on the defendant, the defendant's attorney, and the attorney for the Commonwealth.

(d) All amended motions shall be in writing, shall comply substantially with Rule 1502, and shall be filed and served within the time specified by the judge in ordering the amendment.

Note: Previous Rule 1505 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by present Rules 1506(b), 1508(a), and present Rule 1505(c). Present Rule 1505 adopted February 1, 1989, effective July 1, 1989.

Comment

This rule replaces paragraph (a) of former Rule 1505 and paragraph (c) of former Rule 1502.

"Defective", as used in paragraph (b), is intended to include motions that are inadequate, insufficient, or irregular for any reason; for example, motions that lack particularity; motions that do not comply substantially with Rule 1502; motions that appear to be patently frivolous; motions that do not allege facts which would support relief; motions that raise issues the defendant did not preserve properly or were finally determined at prior proceedings.

When an amended motion is filed pursuant to paragraph (d), it is intended that the clerk of courts transmit a copy of the amended motion to the attorney for the Commonwealth. This transmittal does not require a response unless one is ordered by the judge as provided in these rules. *See* Rules 1503 and 1506.

RULE 1506. ANSWER TO MOTION FOR POST-CONVICTION COLLATERAL RELIEF.

(a) An answer to a motion for post-conviction collateral relief is not required unless ordered by the judge. When the judge has not ordered an answer, the attorney for the Commonwealth may elect to answer, but the failure to file one shall not constitute an admission of the well-pleaded facts alleged in the motion.

(b) Upon the entry of an order directing an answer, the clerk of court shall serve a copy of the order on the attorney for the Commonwealth, the defendant, and the defendant's attorney.

(c) If the judge orders an answer, the answer shall be in writing and shall be filed and served within the time fixed by the judge in ordering the answer. The time for filing the answer may thereafter be extended by the judge for cause shown.

(d) The judge may grant leave to amend or withdraw an answer at any time. Amendment shall be freely allowed to achieve substantial justice. Amended answers shall be in writing and shall be filed and served within the time specified by the judge in granting leave to amend.

Note: Previous Rule 1506 adopted January 24, 1968, effective August 1, 1968; Comment revised April 26, 1979, effective July 1, 1979; rule rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; Comment revised January 28, 1983, effective July 1, 1983; rule rescinded February 1, 1989, effective July 1, 1989, and replaced by Rule 1508. Present Rule 1506 adopted February 1, 1989, effective July 1, 1989.

Comment

As used in the Chapter 1500 Rules, "answer" is intended to include an amended answer filed pursuant to paragraph (d) of this rule, except where the context indicates otherwise.

When determining whether to order that the attorney for the Commonwealth file an answer, the judge should consider whether an answer will promote the fair and prompt disposition of the issues raised by the defendant in the motion for post-conviction collateral relief. *See* Section 9543(B) of the Post Conviction Relief Act (42 Pa.C.S. § 9543(B) (Supp. 1988)) which, inter alia, authorizes the dismissal of the motion if "because of delay in filing . . . , the Commonwealth has been prejudiced either in its ability to respond to the petition or in its ability to re-try the petitioner."

RULE 1507. DISPOSITION WITHOUT HEARING

(a) The judge shall promptly review the motion, any answer by the attorney for the Commonwealth, and other matters of record relating to the defendant's claim(s). If the judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings, the judge shall give notice to the parties of the intention to dismiss the motion and shall state in the notice the reasons for the dismissal. The defendant may respond to the proposed dismissal within 10 days of the date of the notice. The judge thereafter shall either order the motion dismissed, or grant leave to file an amended motion, or direct that the proceedings continue.

(b) A motion for post-conviction collateral relief may be granted without a hearing when the motion and answer show that there is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law.

(c) The judge may dispose of only part of a motion without a hearing by ordering dismissal of or granting relief on only some of the issues raised, while ordering a hearing on other issues.

(d) When the motion is dismissed without a hearing, the judge:

(1) shall issue an order to that effect and shall state in the order the grounds on which the case was determined; and

(2) shall advise the defendant by certified mail, return receipt requested, of the right to appeal from the final order disposing of the motion and of the time within which the appeal must be taken.

Note: Previous Rule 1507 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; amended January 28, 1983, effective July 1, 1983; rescinded February 1, 1989, effective July 1, 1989, and not replaced. Present Rule 1507 adopted February 1, 1989, effective July 1, 1989.

Comment

Previous Rule 1507 was rescinded in 1989 as unnecessary in view of the enactment of the new Post Conviction Relief Act, Act 47 of 1988, 42 Pa.C.S. § 9541 et seq.

(Supp.1988). Present Rule 1507 replaces former Rule 1504.

The judge is permitted, pursuant to paragraph (a), to summarily dismiss a motion for post-conviction collateral relief in certain limited cases. To determine whether a summary dismissal is appropriate, the judge should thoroughly review the motion, the answer if any, and all other relevant information that is included in the record. If after this review, the judge determined that the motion is patently frivolous and without support in the record, or that the facts alleged would not, even if proven, entitle the defendant to relief, or that there are no genuine issues of fact, the judge may dismiss the motion as provided herein.

A summary dismissal would also be authorized under this rule if the judge determines that a previous motion involving the same issue or issues was filed and was finally determined adversely to the defendant. A second or subsequent motion should be summarily dismissed when the judge determines that the defendant has failed to make a strong prima facie showing that a miscarriage of justice may have occurred. *See Commonwealth v. Lawson*, 519 Pa. 504, 549 A.2d 107 (1988). *See also* Rule 1504 with regard to the requirements for appointment of counsel in these cases.

Relief may be granted without a hearing under paragraph (b) only after an answer has been filed either voluntarily or pursuant to court order.

Upon disposition without a hearing under this rule, the judge should also comply with Rule 1508(d), to the extent that it reasonably applies.

RULE 1508. HEARING

(a) Except as provided in Rule 1507, the judge shall order a hearing on all material issues of fact raised by the motion and answer, if any. The judge may deny a hearing on a specific issue of fact when a full and fair evidentiary hearing upon that issue was held at trial or at any proceeding before or after trial. The judge shall schedule the hearing for a time that will afford the parties a reasonable opportunity for investigation and preparation, and shall enter such interim orders as may be necessary in the interests of justice.

(b) The judge, on motion or request, shall postpone or continue a hearing to provide either party a reasonable opportunity, if one did not exist previously, for investigation and preparation regarding any new issue of fact raised in an amended motion or amended answer.

(c) The judge shall permit the defendant to appear in person at the hearing and shall provide the defendant an opportunity to have counsel.

(d) Upon the conclusion of the hearing the judge shall:

(1) determine all material issues raised by the motion, if any;

(2) issue an order denying relief or granting a specific form of relief and stating the grounds on which the case was determined, and issue any supplementary orders appropriate to the proper disposition of the case; and

(3) state on the record, or issue and serve upon the parties, findings of fact and conclusions of law on all material issues.

(e) If the judge disposes of the case in open court at the conclusion of the hearing, the judge shall advise the defendant on the record of the right to appeal from the final order disposing of the motion and of the time within which the appeal must be taken. If the case is taken under advisement, the judge shall advise the defendant of the right to appeal by certified mail, return receipt requested.

Note: Adopted February 1, 1989, effective July 1, 1989.

Comment

This rule replaces former Rule 1506.

With respect to "material issues" as used in this rule, *see*, e.g., *Commonwealth v. Sullivan*, 472 Pa. 129, 371 A.2d 468 (1977); *Commonwealth v. Rightnour*, 469 Pa. 107, 364 A.2d 927 (1976); *Commonwealth v. Webster*, 466 Pa. 314, 353 A.2d 372 (1975); *Commonwealth v. Hayes*, 462 Pa. 291, 341 A.2d 85 (1975); *Commonwealth v. Dancer*, 460 Pa. 95, 331 A.2d 435 (1975); *Commonwealth v. Slavik*, 449 Pa. 424, 297 A.2d 920 (1972).

The judge's power, under paragraph (a), to deny a hearing on a specific factual issue is intended to apply when an issue of fact has already been heard fully, but has never been determined. The judge need not rehear such an issue, but would be required to determine it under paragraph (d).

RULE 1509. APPEAL

An order granting, denying, dismissing, or otherwise finally disposing of a motion for post-conviction collateral relief shall constitute a final order for purposes of appeal.

Note: Adopted February 1, 1989, effective July 1, 1989.

Comment

Disposition without a hearing under Rule 1507(a) and (b) constitutes a final order under this rule. A partial disposition under Rule 1507(c) is not a final order until the judge has fully disposed of all claims.

Pennsylvania Rules of Criminal Procedure 1500-1510 (West 1998 rev. ed.)

CHAPTER 1500. POST-CONVICTION COLLATERAL PROCEEDINGS

RULE 1500. SCOPE

The rules in Chapter 1500 apply to capital and non-capital cases under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546, as amended by Act 1995-32 (SS1).

Note: Adopted August 11, 1997, effective immediately.

Comment – 1997

The 1995 amendments to the Post Conviction Relief Act specifically provide that, "except as specifically provided otherwise, all provisions of this subchapter shall apply to capital and noncapital cases." *See* 42 Pa.C.S. § 9542.

RULE 1501. INITIATION OF POST-CONVICTION COLLATERAL PROCEEDINGS

(1) A petition for post-conviction collateral relief shall be filed within one year of the date the judgment becomes final, except as otherwise provided by statute.

(2) A proceeding for post-conviction collateral relief shall be initiated by filing a petition and 3 copies with the clerk of the court in which the defendant was convicted and sentenced. The petition shall be verified by the defendant.

Note: Previous Rule 1501 adopted January 24, 1968, effective August 1, 1968; amended November 25, 1968, effective February 3, 1969; amended February 15, 1974,

effective immediately; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded November 9, 1984, effective January 2, 1985. Former Rule 1501 adopted November 9, 1984, effective January 2, 1985; rescinded February 1, 1989, effective July 1, 1989, and replaced by present Rule 1502. Present Rule 1501 adopted February 1, 1989, effective July 1, 1989; amended March 22, 1993, effective January 1, 1994; amended August 11, 1997, effective immediately.

Comment – 1997

The rules in Chapter 1500 govern proceedings to obtain relief authorized by the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541 et seq. (hereinafter PCRA).

By statute, a court may not entertain a request for any form of relief in anticipation of the filing of a petition for post-conviction collateral relief. 42 Pa.C.S. § 9545(a). For stays of execution, see 42 Pa.C.S. § 9545(c).

The petition for post-conviction relief under these rules is not intended to be a substitute for or a limitation on the availability of appeal or a post-sentence motion. *See* Pa.Rs.Crim.P. 1410 and 360. Rather, the Chapter 1500 Rules are intended to require that, in a single proceeding, the defendant must raise and the judge must dispose of all grounds for relief available after conviction and exhaustion of the appellate process, either by affirmance or by the failure to take a timely appeal.

Except as provided in Rule 1502(e)(2) for death penalty cases, no discovery is permitted at any stage of the proceedings, except upon leave of the court with a show

of exceptional circumstances. *See* Rule 1502(e)(1), which implements 42 Pa.C.S. § 9545(d)(2).

As used in the Chapter 1500 Rules, "petition for post-conviction collateral relief" and "petition" are intended to include an amended petition filed pursuant to Rule 1505 except where the context indicates otherwise.

Under the 1995 amendments to the PCRA, a petition for post-conviction relief, including second and subsequent petitions, must be filed "within one year of the date the judgment becomes final," 42 Pa.C.S. § 9545(b)(1), unless one of the statutory exceptions applies, see 42 Pa.C.S. § 9545(b)(1)(i)-(iii). Any petition invoking one of these exceptions must be filed within 60 days of the date the claim could have been presented. 42 Pa.C.S. § 9545(b)(2).

The 1995 amendments to the PCRA apply to petitions filed on or after January 16, 1996. A petitioner whose judgment has become final on or before the effective date of the Act is deemed to have filed a timely petition under the Act if the first petition is filed within one year of the effective date of the Act. *See* Section 3 of Act 1995-32(SS1).

For the purposes of the PCRA, a judgment becomes final at the conclusion of direct review, which includes discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review. *See* 42 Pa.C.S. 9545(b)(3).

RULE 1502. CONTENT OF PETITION FOR POST-CONVICTION COLLATERAL RELIEF; REQUEST FOR DISCOVERY

(a) A petition for post-conviction collateral relief shall bear the caption, number, and court term of the case

or cases in which relief is requested and shall contain substantially the following information:

(1) the name of the defendant;

(2) the place where the defendant is confined, or if not confined, the defendant's current address;

(3) the offenses for which the defendant was convicted and sentenced;

(4) the date on which the defendant was sentenced;

(5) whether the defendant was convicted by a jury, by a judge without jury, on a plea of guilty, or on a plea of *nolo contendere;*

(6) the sentence imposed and whether the defendant is now serving or waiting to serve that sentence;

(7) the name of the judge who presided at trial or plea and imposed sentence;

(8) the court, caption, term, and number of any proceeding (including appeals, prior post-conviction collateral proceedings, and federal court proceedings) instituted by the defendant to obtain relief from conviction or sentence, specifying whether a proceeding is pending or has been completed;

(9) the name of each lawyer who represented the defendant at any time after arrest, and the stage of the case at which each represented the defendant;

(10) the relief requested;

(11) the grounds for the relief requested;

(12) the facts supporting each such ground that:

(i) appear in the record, and the place in the record where they appear; and

(ii) do not appear in the record, and an identification of any affidavits, documents, and other evidence showing such facts;

(13) whether any of the grounds for the relief requested were raised before, and if so, at what stage of the case;

(14) a verification by the defendant that the facts set forth in the petition are true and correct to the best of the defendant's personal knowledge or information and belief and that any false statements therein are made subject to the penalties of the Crimes Code, 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities;

(15) if applicable, any request for an evidentiary hearing. The request for an evidentiary hearing shall include a signed certification as to each intended witness, stating the witness's name, address, and date of birth, and the substance of the witness's testimony. Any documents material to the witness's testimony shall also be included in the petition; and

(16) if applicable, any request for discovery.

The petition may, but need not, include concise argument or citation and discussion of authorities.

(b) Each ground relied upon in support of the relief requested shall be stated in the petition. Failure to state such a ground in the petition shall preclude the defendant from raising that ground in any proceeding for post-conviction collateral relief.

(c) The defendant shall state in the petition the name and address of the attorney who will represent the defendant in the post-conviction collateral proceeding. If the defendant is unable to afford or otherwise procure counsel, and wants counsel appointed, the defendant shall so state in the petition and shall request the appointment of counsel.

(d) The defendant shall attach to the petition any affidavits, records, documents, or other evidence which show the facts stated in support of the grounds for relief, or the petition shall state why they are not attached.

(e) Requests for Discovery

(1) Except as provided in paragraph (e)(2), no discovery shall be permitted at any stage of the proceedings, except upon leave of court after a showing of exceptional circumstances.

(2) On the first counseled petition in a death penalty case, no discovery shall be permitted at any stage of the proceedings, except upon leave of court after a showing of good cause.

Note: Previous Rule 1502 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by present Rules 1503 and 1505. Present Rule 1502 adopted February 1, 1989, effective July 1, 1989; amended August 11, 1997, effective immediately.

Comment – 1997

Pursuant to paragraph (a)(6), the petition should include specific information about the sentence imposed, including whether the defendant is currently serving a sentence of imprisonment or probation for the crime awaiting execution of a sentence of death for the crime; or serving a sentence which must expire before the defendant may commence serving the disputed sentence; the minimum and maximum terms of the sentence; the amount of fine or restitution, if any; and whether the defendant is released on parole. *See 42 Pa.C.S. § 9543(a).*

Sections 9543(a)(2), (3), and (4) of the Post Conviction Relief Act, 42 Pa.C.S. § 9543(a)(2), (3), and (4), require that to be eligible for relief, the defendant must plead and prove by a preponderance of the evidence all of the following:

"(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the

inducement caused the petitioner to plead guilty and the petitioner is innocent.

(iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court."

Deleted by statute.

"(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction."

"(3) That the allegation of error has not been previously litigated or waived."

"(4) That the failure to litigate the issue prior to or during trial . . . , or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel." 42 Pa.C.S. § 9543(a)(2), (3) and (4). (Note: the statutory reference to unitary review in this paragraph is not shown in view of the Court's 1997 suspension of the Capital Unitary Review Act.)

By statute, a court may not entertain a request for any form of relief in anticipation of the filing of a petition for post-conviction relief. 42 Pa.C.S. § 9545(a). For stays of execution, see 42 Pa.C.S. § 9545(c).

Paragraphs (a)(16) and (e) were added in 1997 to address requests for discovery. Paragraph (a)(16) requires

that a request for discovery be included in the petition, if applicable. Paragraph (e) sets forth the standards for permitting discovery. Under paragraph (e)(1), which applies in all cases except on the first counseled petition in a death penalty case, no discovery is permitted at any stage of the proceedings, except upon leave of the court with a showing of exceptional circumstances. *See* 42 Pa.C.S. § 9545(d)(2). Under paragraph (e)(2), which applies to first counseled petitions in death penalty cases, discovery is permitted only upon leave of court for good cause shown. For purposes of paragraph (e)(2), "first counseled petition" includes petitions on which defendants have elected to proceed *pro se*.

Second or subsequent petitions will not be entertained unless a strong *prima facie* showing is offered to demonstrate that a miscarriage of justice may have occurred. *Commonwealth v. Szuchon*, 633 A.2d 1098, 1099 (Pa. 1993) (citing *Commonwealth v. Lawson*, 549 A.2d 107 (Pa.1988)). This standard is met if the petitioner can demonstrate either:

> (1) that the proceedings resulting in the petitioner's conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate; or (2) that the petitioner is innocent of the crimes charged. *Commonwealth v. Szuchon*, 633 A.2d 1098, 1100 (Pa. 1993).

It is expected that a form petition will be prepared incorporating the required contents set forth herein which will be available for distribution to uncounseled defendants. This rule is not intended to require an attorney to use a printed form or any other particular format in preparing a petition or an amended petition for post-conviction collateral relief, provided, of course, that the

attorney must include in a petition or amended petition substantially all of the information set forth in this rule.

The petition should be typewritten or legibly handwritten.

RULE 1503. DOCKETING AND ASSIGNMENT

(a) Upon receipt of a petition for post-conviction collateral relief, the clerk of courts shall immediately docket the petition to the same term and number as the underlying conviction and sentence. The clerk shall thereafter transmit the petition and the record to the trial judge, if available, or to the administrative judge, if the trial judge is not available. If the defendant's confinement is by virtue of multiple indictments or informations and sentences, the case shall be docketed to the same term and number as the indictment or information upon which the first unexpired term was imposed, but the court may take judicial notice of all proceedings related to the multiple indictments or informations.

(b) When the petition is filed and docketed, the clerk shall transmit a copy of the petition to the attorney for the Commonwealth.

(c) The trial judge, if available, shall proceed with and dispose of the petition in accordance with these rules, unless the judge determines, in the interests of justice, that he or she should be disqualified.

(d) When the trial judge is unavailable or disqualified, the administrative judge shall promptly assign and transmit the petition and the record to another judge, who shall proceed with and dispose of the petition in accordance with these rules.

Note: Previous Rule 1503 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by present Rule 1504. Present Rule 1503 adopted February 1, 1989, effective July 1, 1989; amended June 19, 1996, effective July 1, 1996; amended August 11, 1997, effective immediately.

Comment – 1997

As used in this rule, "trial judge" is intended to include the judge who accepted a plea of guilty or *nolo contentere.*

The transmittal of the petition to the attorney for the Commonwealth does not require a response unless one is ordered by the judge as provided in these rules, or required by Rule 1506(e).

Although most references to indictments and indicting grand juries were deleted from these rules in 1993 since the indicting grand jury has been abolished in all counties, see PA. CONST. art. I, § 10 and 42 Pa.C.S. § 8931(b), the reference was retained in this rule because there may be some cases still pending that were instituted prior to the abolition of the indicting grand jury.

RULE 1504. APPOINTMENT OF COUNSEL; IN FORMA PAUPERIS

(a) When an unrepresented defendant satisfies the judge that the defendant is unable to afford or other wise procure counsel, the judge shall appoint counsel to

represent the defendant on the defendant's first petition for post-conviction collateral relief.

(b) On a second or subsequent petition, when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, and an evidentiary hearing is required as provided in Rule 1508, the judge shall appoint counsel to represent the defendant.

(c) The judge shall appoint counsel to represent a defendant whenever the interests of justice require it.

(d) An appointment of counsel shall be effective throughout the post-conviction proceedings, including any appeal from disposition of the petition for post-conviction collateral relief.

(e) When a defendant satisfies the judge that the defendant is unable to pay the costs of the post-conviction collateral proceedings, the judge shall order that the defendant be permitted to proceed in forma pauperis.

Note: Previous Rule 1504 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by Rule 1507. Present Rule 1504 adopted February 1, 1989, effective July 1, 1989; amended August 11, 1997, effective immediately.

Comment – 1997

If a defendant seeks to proceed without an attorney, the court may appoint standby counsel. *See* Rule 318.

Consistent with Pennsylvania post-conviction practice under former Rules 1503 and 1504, it is intended that counsel be appointed in every case in which a defendant has filed a petition for post-conviction collateral relief for the first time and is unable to afford counsel or otherwise procure counsel. However, the rule now limits appointment of counsel on second or subsequent petitions so that counsel should be appointed *only* if the judge determines that an evidentiary hearing is required. Of course, the judge has the discretion to appoint counsel in any case when the interests of justice require it.

RULE 1505. AMENDMENT AND WITHDRAWAL OF PETITION FOR POST-CONVICTION COLLATERAL RELIEF

(a) The judge may grant leave to amend or withdraw a petition for post-conviction collateral relief at any time. Amendment shall be freely allowed to achieve substantial justice.

(b) When a petition for post-conviction collateral relief is defective as originally filed, the judge shall order amendment of the petition, indicate the nature of the defects, and specify the time within which an amended petition shall be filed. If the order directing amendment is not complied with, the petition may be dismissed without a hearing.

(c) Upon the entry of an order directing an amendment, the clerk of courts shall serve a copy of the order on the defendant, the defendant's attorney, and the attorney for the Commonwealth.

(d) All amended petitions shall be in writing, shall comply substantially with Rule 1502, and shall be filed and served within the time specified by the judge in ordering the amendment.

Note: Previous Rule 1505 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by Rules 1506(b), 1508(a), and present Rule 1505(c). Present Rule 1505 adopted February 1, 1989, effective July 1, 1989; amended August 11, 1997, effective immediately.

Comment – 1997

"Defective," as used in paragraph (b), is intended to include petitions that are inadequate, insufficient, or irregular for any reason; for example, petitions that lack particularity; petitions that do not comply substantially with Rule 1502; petitions that appear to be patently frivolous; petitions that do not allege facts which would support relief; petitions that raise issues the defendant did not preserve properly or were finally determined at prior proceedings.

When an amended petition is filed pursuant to paragraph (d), it is intended that the clerk of courts transmit a copy of the amended petition to the attorney for the Commonwealth. This transmittal does not require a response unless one is ordered by the judge as provided in these rules. *See* Rules 1503 and 1506.

RULE 1506. ANSWER TO PETITION FOR POST-CONVICTION COLLATERAL RELIEF

(a) Except as provided in paragraph (e), an answer to a petition for post-conviction collateral relief is not required unless ordered by the judge. When the judge has not ordered an answer, the attorney for the Commonwealth may elect to answer, but the failure to file one shall not constitute an admission of the well-pleaded facts alleged in the petition.

(b) Upon the entry of an order directing an answer, the clerk of courts shall serve a copy of the order on the attorney for the Commonwealth, the defendant, and the defendant's attorney.

(c) If the judge orders an answer, the answer shall be in writing and shall be filed and served within the time fixed by the judge in ordering the answer. The time for filing the answer may thereafter be extended by the judge for cause shown.

(d) The judge may grant leave to amend or withdraw an answer at any time. Amendment shall be freely allowed to achieve substantial justice. Amended answers shall be in writing and shall be filed and served within the time specified by the judge in granting leave to amend.

(e) Answers in Death Penalty Cases.

(1) *First Counseled Petitions.*

(i) The Commonwealth shall file an answer to the first counseled petition for collateral review in a death penalty case.

(ii) The answer shall be filed within 120 days of the filing and service of the petition. For

good cause shown, the court may order extensions, of up to 90 days each, of the time for filing the answer.

(2) *Second and Subsequent Petitions.*

(i) An answer to a second or subsequent petition for post-conviction collateral relief is not required unless ordered by the judge. When the judge has not ordered an answer, the attorney for the Commonwealth may elect to file an answer.

(ii) The answer shall be filed within 120 days of the filing and service of the petition. For good cause shown, the court may order extensions, of up to 90 days each, of the time for filing the answer.

(3) *Amendments to Answer.* The judge may grant the Commonwealth leave to amend the answer at any time, and amendment shall be freely allowed to achieve substantial justice. Amended answers shall be in writing, and shall be filed and served within the time specified by the judge in granting leave to amend.

Note: Previous Rule 1506 adopted January 24, 1968, effective August 1, 1968; *Comment* revised April 26, 1979, effective July 1, 1979; rule rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; *Comment* revised January 28, 1983, effective July 1, 1983; rule rescinded February 1, 1989, effective July 1, 1989, and replaced by Rule 1508. Present Rule 1506 adopted February 1, 1989, effective July 1, 1989; amended August 11, 1997, effective immediately.

Comment - 1997

As used in the Chapter 1500 Rules, "answer" is intended to include an amended answer filed pursuant to paragraphs (d) and (e)(3) of this rule, except where the context indicates otherwise.

Except as provided in paragraph (e), when determining whether to order that the attorney for the Commonwealth file an answer, the judge should consider whether an answer will promote the fair and prompt disposition of the issues raised by the defendant in the petition for post-conviction collateral relief.

Paragraph (e)(1) was added in 1997 to require that the Commonwealth file an answer to the first counseled petition in a death penalty case. For second and subsequent petitions, paragraph (e)(2) would apply.

"First counseled petition," as used in paragraph (e)(1), includes petitions on which defendants have elected to proceed pro se. *See also* the *Comment* to Rule 1503.

RULE 1507. DISPOSITION WITHOUT HEARING

Except as provided in Rule 1509 for death penalty cases,

(a) the judge shall promptly review the petition, any answer by the attorney for the Commonwealth, and other matters of record relating to the defendant's claim(s). If the judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings, the judge shall give notice to the parties of

the intention to dismiss the petition and shall state in the notice the reasons for the dismissal. The defendant may respond to the proposed dismissal within 20 days of the date of the notice. The judge thereafter shall order the petition dismissed, grant leave to file an amended petition, or direct that the proceedings continue.

(b) A petition for post-conviction collateral relief may be granted without a hearing when the petition and answer show that there is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law.

(c) The judge may dispose of only part of a petition without a hearing by ordering dismissal of or granting relief on only some of the issues raised, while ordering a hearing on other issues.

(d) When the petition is dismissed without a hearing, the judge shall issue an order to that effect and shall advise the defendant by certified mail, return receipt requested, of the right to appeal from the final order disposing of the petition and of the time within which the appeal must be taken.

Note: Previous Rule 1507 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; amended January 28, 1983, effective July 1, 1983; rescinded February 1, 1989, effective July 1, 1989, and not replaced. Present Rule 1507 adopted February 1, 1989, effective July 1, 1989; amended August 11, 1997, effective immediately.

Comment – 1997

The judge is permitted, pursuant to paragraph (a), to summarily dismiss a petition for post-conviction collateral relief in certain limited cases. To determine whether a summary dismissal is appropriate, the judge should thoroughly review the petition, the answer, if any, and all other relevant information that is included in the record. If, after this review, the judge determines that the petition is patently frivolous and without support in the record, or that the facts alleged would not, even if proven, entitle the defendant to relief, or that there are no genuine issues of fact, the judge may dismiss the petition as provided herein.

A summary dismissal would also be authorized under this rule if the judge determines that a previous petition involving the same issue or issues was filed and was finally determined adversely to the defendant. *See* § 9545(b) for the timing requirements for filing second and subsequent petitions.

Second or subsequent petitions will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred. *Commonwealth v. Szuchon*, 633 A.2d 1098, 1099 (Pa.1993) (citing *Commonwealth v. Lawson*, 549 A.2d 107 (Pa.1988)). This standard is met if the petitioner can demonstrate either: (1) that the proceedings resulting in the petitioner's conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate; or (2) that the petitioner is innocent of the crimes charged. *Commonwealth v. Szuchon*, 633 A.2d 1098, 1100 (Pa.1993).

For the requirements for appointment of counsel on second and subsequent petitions, *see* Rule 1504(b).

Relief may be granted without a hearing under paragraph (b) only after an answer has been filed either voluntarily or pursuant to court order.

A PCRA petition may not be dismissed due to delay in filing except after a hearing on a motion to dismiss. 42 Pa.C.S. § 9543(b). *See* Rule 1508.

RULE 1508. HEARING

(a) Except as provided in Rule 1507, the judge shall order a hearing:

(1) whenever the Commonwealth files a motion to dismiss due to the defendant's delay in filing the petition, or

(2) when the petition for post-conviction relief or the Commonwealth's answer, if any, raises material issues of fact. However, the judge may deny a hearing on a specific issue of fact when a full and fair evidentiary hearing upon that issue was held at trial or at any proceeding before or after trial.

The judge shall schedule the hearing for a time that will afford the parties a reasonable opportunity for investigation and preparation, and shall enter such interim orders as may be necessary in the interests of justice.

(b) The judge, on petition or request, shall postpone or continue a hearing to provide either party a reasonable opportunity, if one did not exist previously, for investigation and preparation regarding any new issue of fact raised in an amended petition or amended answer.

(c) The judge shall permit the defendant to appear in person at the hearing and shall provide the defendant an opportunity to have counsel.

(d) Upon the conclusion of the hearing the judge shall:

(1) determine all material issues raised by the defendant's petition and the Commonwealth's answer, or by the Commonwealth's motion to dismiss, if any;

(2) issue an order denying relief or granting a specific form of relief and issue any supplementary orders appropriate to the proper disposition of the case.

(e) If the judge disposes of the case in open court at the conclusion of the hearing, the judge shall advise the defendant on the record of the right to appeal from the final order disposing of the petition and of the time within which the appeal must be taken. If the case is taken under advisement, the judge shall advise the defendant of the right to appeal by certified mail, return receipt requested.

Note: Adopted February 1, 1989, effective July 1, 1989; amended August 11, 1997, effective immediately.

Comment

The judge's power, under paragraph (a), to deny a hearing on a specific factual issue is intended to apply when an issue of fact has already been heard fully, but has never been determined. The judge need not rehear such an issue, but would be required to determine it under paragraph (d).

The 1997 amendment to paragraph (a)(1) requires a hearing on every Commonwealth motion to dismiss due to delay in the filing of a PCRA petition. See 42 Pa.C.S. § 9543(b), as amended in 1995.

See also Rule 1509 for procedures in death penalty cases.

Except as provided in Rule 1502(e)(2) for first counseled petitions in death penalty cases, no discovery is permitted at any stage of the proceedings, except upon leave of the court with a showing of exceptional circumstances. *See* 42 Pa.C.S. § 9545(d)(2).

RULE 1509. PROCEDURES FOR PETITIONS IN DEATH PENALTY CASES: HEARING DISPOSITION

(a) No more than 20 days after the Commonwealth files an answer pursuant to Rule 1506(e)(1) or (e)(2), or if no answer is filed as permitted in Rule 1506(e)(2), within 20 days after the expiration of the time for answering, the judge shall review the petition, the Commonwealth's answer, if any, and other matters of record relating to the defendant's claim(s), and shall determine whether an evidentiary hearing is required.

(b) If the judge is satisfied from this review that there are no genuine issues concerning any material fact, that the defendant is not entitled to post-conviction collateral relief, and that no purpose would be served by any further proceedings,

(1) the judge shall give notice to the parties of the intention to dismiss the petition and shall state in the notice the reasons for the dismissal.

(2) The defendant may respond to the proposed dismissal by filing a request for oral argument within 20 days of the date of the notice.

(3) No later than 90 days from the date of the notice, or from the date of the oral argument, if granted, the judge shall:

(i) dismiss the petition, issue an order to that effect, and advise the defendant by certified mail, return receipt requested, of the right to appeal from the final order disposing of the petition and of the time within which the appeal must be taken;

(ii) grant the defendant leave to file an amended petition; and/or

(iii) order that an evidentiary hearing be held on a date certain.

(c) If the judge determines that an evidentiary hearing is required, the judge shall enter an order setting a date certain for the hearing, which shall be not be scheduled for fewer than 10 days or more than 45 days from the date of the order. The judge may, for good cause shown, grant leave to continue the hearing. No more than 90 days after the evidentiary hearing, the judge shall dispose of the petition.

(d) Failure of the judge to dispose of the petition within 90 days as required by paragraphs (b)(3) and (c) may result in the imposition of sanctions.

Note: Previous Rule 1509 adopted February 1, 1989, effective July 1, 1989; renumbered Rule 1510 August 11, 1997, effective Immediately. Present Rule 1509 adopted August 11, 1997, effective immediately.

Comment – 1997

It is intended that once a determination is made under this rule that an evidentiary hearing is required, the provisions of Rule 1508(c), (d), and (e) apply.

RULE 1510. APPEAL

An order granting, denying, dismissing, or otherwise finally disposing of a petition for post-conviction collateral relief shall constitute a final order for purposes of appeal.

Note: Previously Rule 1509, adopted February 1, 1989, effective July 1, 1989; renumbered and amended August 11, 1997, effective immediately

Comment – 1997

Disposition without a hearing under Rule 1507(a) and (b), or under Rule 1509(b)(3)(i), constitutes a final order under this rule. A partial disposition under Rule 1507(c) is not a final order until the judge has fully disposed of all claims.

No. 03-9627

Supreme Court, U.S.
FILED
JAN 21 2005
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In The

Supreme Court of the United States

JOHN A. PACE,

Petitioner,

v.

DAVID DiGUGLIELMO Superintendent,
State Correctional Institution at Graterford,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTIONS PRESENTED

1. Was petitioner entitled to toll the federal habeas deadline under section 2244(d)(2) by filing, in state court, a petition for collateral review that violated the state's statutory, jurisdictional time limit, and did not properly commence a post-conviction action?

2. Was petitioner entitled to equitable tolling where he sat on "new" legal issues for four years before any state or federal filing deadlines were enacted, and then delayed his federal habeas petition for three more years while litigating an untimely, futile, successive petition in state court?

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STATEMENT OF THE CASE

Murder and plea: 1986

In the course of a robbery, petitioner beat a man to death with a blackjack. The murder occurred on September 18, 1985. The victim, a slightly-built 56-year-old man, had a job in New Jersey, where he was due at 8:00 A.M. He was carrying a brown paper lunch bag. Because he faced a long commute from Philadelphia by public transportation, he was on his way by 4:30 in the morning.

That is when petitioner found him. Unlike the victim, petitioner was at the end of his day, and he was out of money. But he did have in his pocket a blackjack, which he had stolen from a car earlier in the week.

Petitioner noticed the victim and determined to rob him. He grabbed the man's coat and threw him to the pavement. When the victim tried to rise, petitioner began beating him on the head with the blackjack.

An officer on patrol saw the beating and approached the scene. Petitioner walked off, throwing the blackjack into a breezeway as he passed, but he was apprehended and the weapon was recovered. The victim was found lying on the sidewalk with his legs sprawled in the street, and was transported to a hospital. He lingered for ten days, without regaining consciousness, until he died.

Police first questioned petitioner shortly after the assault. Because he was a juvenile, seven months short of his eighteenth birthday, petitioner was warned and interrogated in the presence of his mother. He gave a statement admitting that he had intended to rob the victim, and that he beat the victim's head with the blackjack. After the victim died, petitioner was re-interviewed, again with his mother. He reiterated his earlier confession. J.A. 66-77.

Petitioner was charged with first-degree murder, with notice of an aggravating circumstance that made him eligible for the death penalty. *See* 42 Pa. Cons. Stat. Ann. § 9711(d)(6) ("killing while in the perpetration of a felony"). J.A. 25.

Under Pennsylvania statute, murder charges are not within the jurisdiction of the juvenile court. Petitioner nevertheless sought a transfer there, on the ground that he was making progress in the prison classes he had been attending since his arrest. The court, however, denied the transfer motion, which would have required his release from custody at age 21, resulting in a maximum sentence of only three years for a potentially capital offense. J.A. 33-49.

At that point petitioner, with his parents and his lawyer, reached a plea agreement. The Commonwealth agreed to reduce grading of the murder from first to second degree, which carried a mandatory life sentence but eliminated the possibility of the death penalty. The Commonwealth also agreed to drop the remaining charges, and indicated that it would not proceed in an earlier robbery, committed before the murder here, for which petitioner was still facing trial. J.A. 48-51, 82.

Petitioner's mother and father participated in the plea colloquy, which took place in February 1986. Petitioner's mother vouched that he fully understood the consequences of the plea. Petitioner stated his understanding that, whatever anyone may have told him, he would be bound by his answers in the colloquy. He admitted all the facts of the crime. He also stated his understanding, three different times, that his sentence would be to life in prison.

Petitioner was given warnings about his right to file a motion to withdraw the guilty plea, and to appeal on the

ground that it was not knowing, voluntary, and intelligent. Petitioner filed no motion or appeal. J.A. 51-65, 77-85.

First post-conviction petition: 1986-92

Six months later, petitioner filed a pro se petition under Pennsylvania's post-conviction review act, 42 Pa. Cons. Stat. Ann. § 9541 et seq. He claimed that his confession and guilty plea were not valid after all, and his lawyer was bad. Counsel was appointed and two amended petitions were filed, alleging that prior counsel was ineffective regarding suppression, juvenile transfer, and degree of guilt. The petitions further claimed ineffectiveness on the ground that petitioner hadn't believed that life in prison meant life, rather than some lesser period. Petitioner received an evidentiary hearing at which he testified about his understanding of life imprisonment. J.A. 86-100, 108-14, 126-28.

The post-conviction court denied relief. Petitioner appealed through counsel to the intermediate state court, where the ruling was upheld. Petitioner filed an untimely application for discretionary review in the Pennsylvania Supreme Court, which denied review. These proceedings were completed in September 1992. J.A. 119-32, 142-83.

Pre-deadline delay: 1992-96

At that point petitioner did nothing, for over four years. Toward the end of this period, in November 1995, the Pennsylvania legislature enacted a first-time-ever post-conviction filing deadline. The new provision established a one-year time limit for all defendants who had not previously litigated a post-conviction petition. Those who already had done so, however, like petitioner, would be

barred except in particular circumstances for claims that were previously unavailable.

The legislature delayed the effective date of the new provision for 60 days, until January 1996. In the interim, no filing deadlines would apply, whether or not the defendant had previously received collateral review.

Second post-conviction petition: 1996-99

Petitioner, however, still did nothing, until November 1996, ten months after the filing deadline and ten and a half years after his guilty plea. At that point he filed a new post-conviction petition. There he claimed again that the plea was invalid because he did not understand that life meant life. This time he presented "new" facts in support of the claim: allegations by his parents and brother that they were with him before the plea, and that petitioner's lawyer said he would probably serve only ten or fifteen years. In addition, petitioner made a separate claim that his life sentence was invalid because, in his view, Pennsylvania statutes entitled him to the setting of a parole date. He also argued that counsel in his previous post-conviction litigation were ineffective. J.A. 184-201.

The court again appointed counsel for petitioner. Counsel filed a no-merit letter with the court. Accordingly, pursuant to post-conviction procedure, the court dismissed the petition without directing any response by the Commonwealth. Petitioner appealed and the Commonwealth filed a brief, pointing out that review was barred by the post-conviction time limit. Accordingly, the court below had been without jurisdiction to entertain a new petition. J.A. 228-98.

Petitioner responded. He acknowledged that a new time limit had been enacted before his filing, and that case

law had applied it. He argued, however, that it did not apply to him because his guilty plea occurred before the enactment of the post-conviction filing deadline. He also claimed, as a "new fact," that in 1986 – before his first PCRA petition – he had learned that life means life. The appellate court rejected petitioner's argument, holding that his petition was indeed untimely and that the court below was without jurisdiction. J.A. 299-317.

Petitioner pursued the matter, filing a reargument application. This time he claimed, for the first time, that he fell within the exception to the post-conviction filing deadline for "governmental interference." The nature of the interference was that, in 1989 – while he was litigating his first post-conviction petition, with the assistance of counsel, and seven years before he filed his second post-conviction petition – there had been a prison riot. His personal copies of legal papers were lost. The Commonwealth responded that petitioner was not permitted to raise a new legal claim in a reargument application, and the application was denied. J.A. 318-26. Petitioner then sought discretionary review in the Pennsylvania Supreme Court, which denied the application. J.A. 327-72.

Pre-habeas delay: July-December 1999

By now it was July 1999 -- almost four years after enactment of Pennsylvania's post-conviction time limit, more than two years after expiration of the new grace period for filing federal habeas corpus petitions, and more than a year after petitioner had acknowledged in state court the Pennsylvania filing deadline and the decisional law applying it to cases like his.

Federal habeas petition: December 1999-present

Petitioner waited another five months. Then he filed the federal habeas corpus petition that is the subject of this writ of certiorari – in December 1999. The habeas petition reiterated the claims raised in petitioner's second state post-conviction petition, but dropped the other claims exhausted in petitioner's first state post-conviction petition. J.A. 373-90.

Respondent pointed out that the habeas petition was plainly out of time. The magistrate judge recommended dismissal on that ground. J.A. 391-406. The district court, however, accepting each and every one of the myriad arguments put forth by petitioner, granted him both statutory and equitable tolling. The court appointed counsel for petitioner from the Capital Habeas Corpus Unit of the Defender Association of Philadelphia. J.A. 447-67. The court subsequently denied the Commonwealth's motion for reconsideration of the tolling questions, but granted its motion for an immediate appeal. J.A. 503-33.

The United States Court of Appeals – following its own precedent, and consistent with the majority of the circuits – reversed. The court of appeals held that petitioner was entitled to neither statutory nor equitable tolling. J.A. 534-38. Petitioner sought a writ of certiorari in this Court, which granted the writ on September 28, 2004.

SUMMARY OF ARGUMENT

Pennsylvania, like Congress, has chosen to limit the time for filing post-conviction petitions. Petitioner, knowing of the limit, chose to file a state post-conviction petition after

the deadline, and chose not to file a federal habeas petition in the interim, betting that the delay might not be counted against him in either court. The habeas corpus tolling provision does not permit that kind of delay, nor do equitable tolling principles.

The Pennsylvania legislature passed a post-conviction filing deadline that closely tracks AEDPA's – one year, with three exceptions for newly-arising claims. The Pennsylvania statute, however, explicitly designates its time limit as a jurisdictional requirement, in explicit distinction to non-jurisdictional procedural bars in the statute, which are subject to court-made exceptions. The Pennsylvania courts have uniformly applied the filing deadline as a mandatory prerequisite to the exercise of judicial authority in post-conviction actions. A post-conviction petition that does not meet the filing deadline cannot plausibly be characterized as "properly filed."

Contrary to petitioner's argument, "proper filing" requirements under § 2244(d)(2) are not limited to purely mechanical rules that are enforced by court clerks standing at the counter. The tolling provision refers not simply to physical "delivery" of papers to a court employee, but to the proper commencement of the post-conviction process. The goal of the "properly filed" proviso is to protect important state interests concerning invocation of post-conviction actions – not to deprive petitioners of federal review because they transgressed minor rules of form in the clerk's office.

Nor are proper filing requirements limited to purely "claim-blind" rules. When subsection (d)(2) speaks of proper filing in regard to "applications," it does not exclude filing rules that consider the nature of individual claims within the application – for example, whether a claim is

based on a new rule of constitutional law. Section 2244 uses exactly the same word – "application" – in contexts that call for exactly such claim-by-claim review. If, as petitioner contends, all "proper filing" rules had to be claim-free, then states could never have filing deadlines with "exceptions" like those in the federal statute of limitations or successive petition provision – and as a consequence petitioners could never exhaust in state court the kinds of claims that would qualify for review in federal court.

Equitable tolling does not permit petitioner to escape the consequences of his decision to pursue untimely, additional litigation in state court at the expense of proceeding on time in federal court. Petitioner cannot blame the delay on his "uncertainty" about the state filing deadline, because most of his delay occurred before the filing deadline even existed. Nor can he blame the need to exhaust, because when he finally did initiate a second post-conviction petition, he tried to preserve only issues that were already exhausted, or that were non-federal.

Uncertainty would be no excuse in any case. Petitioner always knew there was a risk that his state petition would be deemed untimely, and therefore would not toll his federal habeas deadline. That risk only grew greater as the law developed. Petitioner was not entitled to take the risk merely because he wanted to exhaust more claims: by enacting a statute of limitations, Congress necessarily limited the opportunities to exhaust more claims. Equitable tolling cannot properly defeat the statute's mandate.

ARGUMENT

I. A state post-conviction petition that has been ruled untimely by the state's own courts, under a mandatory, non-waivable, jurisdictional time limit that is prerequisite to substantive review, is not properly filed under section 2244(d)(2) and cannot toll the time for filing a federal habeas petition.

A. Under Pennsylvania law, petitioner's untimely petition did not lawfully invoke the court's authority to act, and thus could not properly commence a post-conviction action.

Petitioner argues that this Court's decision in *Artuz v. Bennett*, 531 U.S. 4 (2000), was a bequest of which he is a beneficiary, along with all others filing untimely, jurisdictionally barred Pennsylvania post-conviction petitions. Curiously, however, he barely mentions the language from *Artuz* that bears most directly on the issue in this case:

> [A]n application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, . . . the time limits upon . . . delivery. . . . See, *e.g.*, . . . *Lovasz v. Vaughn*, 134 F.3d 146, 148 (CA3 1998). . . . If, for example, an application is erroneously accepted by the clerk of a court lacking jurisdiction, . . . it will be *pending*, but not *properly filed*.

531 U.S. at 8-9.[1] Petitioner's efforts to downplay these words, in a footnote at the end of his *Artuz* arguments,

[1] The relevant language from *Lovasz v. Vaughn* is as follows:

> We believe that a "properly filed application" is one submitted according to the state's procedural requirements, such

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Brief for Petitioner at 29 n.20, have far broader implications than he lets on, and will be addressed below. First, however, it is necessary to clarify the nature of the Pennsylvania filing requirement at stake.

Petitioner works to portray the Pennsylvania filing requirement as equivalent to the two New York procedural rules at issue in *Artuz*; but it is clear under Pennsylvania law that its jurisdictional time limit is significantly different. In Pennsylvania, all post-conviction litigation in criminal cases is governed by the Post-Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. Ann. §§ 9541-46. For many years, the PCRA contained no filing deadlines. It did, on the other hand, include procedural bars very much like New York's successive petition rules. There was also an open-ended laches provision akin to former Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts. These sections, which remain in the statute with minor changes, have never been referred to either as filing requirements or as jurisdictional. Instead they appear in the portion of the PCRA explicitly entitled "Eligibility for Relief."[2]

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as the rules governing the time and place of filing. A Pennsylvania PCRA petitioner, for example, must file a motion with the clerk of the court in which he was convicted and sentenced, Pa. R. Crim. P. 1501, generally within one year of the date the judgment becomes final, 42 Pa. Cons. Stat. Ann. § 9545(b)(1).

134 F.3d at 148.

[2] 42 Pa. Cons. Stat. Ann. § 9543(a)(3) (prohibiting relitigation of claims raised in a prior appeal or collateral proceeding, or litigation of new claims that could have been raised in a prior appeal or collateral proceeding); 42 Pa. Cons. Stat. Ann. § 9543(b) (petition otherwise eligible for relief may be dismissed if delay in filing prejudices Commonwealth's ability to respond or to retry case); *see* 42 Pa. Cons. Stat. Ann. §§ 9544(a), (b) (defining terms).

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By 1995, however, there were growing concerns that these existing limitations were not adequate to address the problem of post-conviction delay in capital and non-capital cases. The Pennsylvania Legislature undertook a major revision of the law, guided in significant respects by the federal habeas reform package that was then moving through Congress and soon became the AEDPA. As with AEDPA, the legislature created a whole new subchapter exclusively devoted to capital cases, 42 Pa. Cons. Stat. Ann. §§ 9570-79, and also made many changes to the existing PCRA for non-capital cases and for capital cases not falling under the new subchapter.

The most significant of the PCRA amendments was the creation of a filing deadline for post-conviction petitions. This was a radical departure from prior Pennsylvania practice, which had never imposed a specific time period for seeking post-conviction review. The filing provision closely paralleled the then-pending federal proposal that became § 2244(d). As under § 2244(d), petitioners generally have one year to file from the conclusion of direct review. But also as under § 2244(d), there are three instances in which a later deadline applies: if governmental interference prevented prior filing; if a new constitutional right is recognized and made retroactive; or if new facts arise that could not have been discovered through due diligence. 42 Pa. Cons. Stat. Ann. § 9545(b).

In addition to these procedural bars, the "Eligibility for Relief" provision also lists substantive bases for relief, such as illegal sentence and ineffective assistance of counsel. 42 Pa. Cons. Stat. Ann. § 9543(a)(2).

These three late filing provisions, referred to in the Pennsylvania statute as "exceptions," in fact operate as triggering events, in a manner similar to the cognate provisions in the federal statute. That is, a new filing period (albeit shorter than the original year) begins to run any time one of the specified contingencies occurs. *See* 42 Pa. Cons. Stat. Ann. § 9545(b)(2). By corresponding its filing deadline in this respect to § 2244(d), the state achieved two goals. It opened an avenue for state court review of exactly those late-arising claims for which federal habeas review would lie; and it did so in a manner that nonetheless prevented delay. Thus the state time limit allows no excuse for not exhausting, but no excuse for not doing it promptly either.

In one important particular, however, the Pennsylvania Legislature chose to depart from the federal filing deadline: the matter of jurisdiction. The legislature was aware that the successive petition and delay provisions already present in the PCRA had been subjected, through the exercise of judicial authority, to various qualifications and circumventions – notably for "miscarriages of justice." The legislature, however, had considered and rejected that kind of provision in its new time limit.[3] To emphasize, therefore, that the new filing provision was of a different nature than the procedural bars in the existing statute, the legislature designated the filing deadline as a jurisdictional requirement.

Accordingly, the amended statute placed the new filing requirements not in the "Eligibility for Relief"

[3] *See* Pennsylvania Legislative Journal – House, First Special Session, at 510-12, 517-19 (October 30, 1995) (debate on proposed amendment to add "manifest injustice" exception).

section of the PCRA, 42 Pa. Cons. Stat. Ann. § 9543, where the laches and successive petitions clauses appeared, but in a separate section entitled "Jurisdiction and Proceedings," where the time limit forms a new subsection, 42 Pa. Cons. Stat. Ann. § 9545(b). Jurisdictional amendments were also made to the subsections that precede and follow the filing provision. These new enactments remove the power of the PCRA court to entertain pre-petition requests for preliminary relief, such as discovery, or to grant unauthorized stays of execution. 42 Pa. Cons. Stat. Ann. § 9545(a), 9545(c).

These invocations of jurisdictional status, while significant in themselves, take on particular meaning as a matter of Pennsylvania law. Under the Pennsylvania Constitution, the powers of the legislature and the courts are strictly separated. Most matters concerning the operation of the judicial system, such as court rules, are solely within the control of judges. One judicial matter, however, is reserved uniquely to the legislature: the setting of jurisdiction of the courts.[4] Thus the limitations period was not a rule of practice for the orderly administration of court business, but an application of the legislature's exclusive constitutional authority to determine the types of post-conviction cases within the courts' authority to adjudicate.

And from the beginning, the Pennsylvania courts have recognized that they were without legal authority to

[4] Pa. Const. art. V, § 2(c) (state supreme court "shall have such jurisdiction as shall be provided by law"); art. V, § 10(c) (state supreme court "shall have the power to prescribe general rules governing practice, procedure and conduct of all courts," but may not "affect the right of the General Assembly to determine the jurisdiction of any court").

disregard or go beyond the terms of the new PCRA filing requirement. The very first appellate opinion to address the statute stated in unmistakable terms:

> [T]he PCRA court lacked jurisdiction to hear appellant's PCRA petition. . . . We note that before the 1995 amendments to the PCRA, this Court and the Supreme Court had held that delay in filing a PCRA petition, standing alone, is not a sufficient reason to deny the petition. . . . It is clear from the enactment of the 1995 amendments that the General Assembly intended to change existing law by providing that delay **by itself** can result in the dismissal of a petitioner's PCRA petition. As a result, though this result may appear harsh . . . , that is the result compelled by the statute. . . . The trial court properly denied appellant's PCRA petition as it lacked jurisdiction to hear the petition because it was untimely under 42 Pa. C.S. § 9545.

Commonwealth v. Alcorn, 703 A.2d 1054, 1056-57 (Pa. Super. 1997) (emphasis in original).

Subsequent Pennsylvania decisions have recognized that, because the filing requirement is jurisdictional, 1) it cannot be waived by the state, 2) it must be considered *sua sponte* by the court if not raised by the parties, 3) it must be resolved as a threshold question before the merits can be addressed, 4) it must be applied regardless of the merits or magnitude of the substantive claims raised, and 5) it is not subject to non-statutory forbearance such as lack of notice, equitable tolling, miscarriage of justice, illegality of sentence, or ineffective assistance of counsel.[5]

[5] *See, e.g., Commonwealth v. Judge*, 797 A.2d 250, 256 n.13 (Pa. 2002) (although Commonwealth did not previously claim that PCRA petition was untimely, "we will address it because the claim relates to

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As a matter of Pennsylvania law, then, there can be no doubt about the meaning of the post-conviction filing deadline. The time limit is specifically distinguished from procedural bars and other forms of eligibility for relief. Instead, the PCRA filing deadlines are "[j]urisdictional time limits [that] go to a court's right or competency to adjudicate a controversy." *Commonwealth v. Fahy*, 737 A.2d 214, 222 (Pa. 1999). Under Pennsylvania law, therefore, an untimely post-conviction petition does not properly invoke post-conviction jurisdiction, cannot properly commence a post-conviction action: is not properly filed.

B. Federal law does not excuse petitioner's delay and ignore Pennsylvania's post-conviction time limit merely because the state filing rule is not automatic and absolute, but instead allows for judicial review and for consideration of newly-arising claims.

Petitioner argues that we should not be fooled by Pennsylvania's post-conviction time limit: just because it

our subject matter jurisdiction"); *Commonwealth v. Yarris*, 731 A.2d 581, 587 (Pa. 1999) ("Because the timeliness implicates our jurisdiction, we may consider the matter sua sponte"); *Commonwealth v. Pursell*, 749 A.2d 911, 913-14 (Pa. 2000) (trial court denied post-conviction claims on basis of previous litigation and waiver bars, without addressing petitioner's claims that petition was timely; "[b]ecause this presents a threshold question concerning whether there is jurisdiction to grant relief on Appellant's petition, however, we will address this matter"); *Commonwealth v. Howard*, 788 A.2d 351, 356 (Pa. 2002) ("The timeliness requirements of the PCRA do not vary based 'on the nature of the constitutional violations alleged therein. . . . To the contrary, . . . the PCRA's timeliness requirements . . . are intended to apply to all PCRA petitions, regardless of the nature of the individual claims raised therein' "); *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 1999) (refusing to trump statutory time limits with judicial doctrines such as "relaxed waiver," equitable tolling, miscarriage of justice, or "King's Bench" powers).

calls itself a filing requirement, and is consistently enforced as a prerequisite to the exercise of post-conviction jurisdiction, doesn't mean it has anything to do with "properly filed" applications for post-conviction relief under § 2244(d)(2) of the federal habeas statute. Congress must have meant some other kind of thing entirely.

Petitioner offers two conditions for the kind of post-conviction time limit that Congress really meant when it referred to "properly filed" petitions. First, the filing deadline has to be applied automatically, by court clerks, at the point where the petition is physically presented. Second, the filing deadline has to be applied absolutely, without regard to individual claims that might have been unavailable at the time of the original deadline. Pennsylvania meets neither condition, contends petitioner, so his untimely, jurisdiction-barred post-conviction petition was perfectly "proper," and he gets tolling. The problem with this approach is that the language Congress chose in the habeas statute cannot support either of petitioner's glosses on (d)(2).

1. "Clerk-specific" rules.

Petitioner's first challenge to the Pennsylvania time limit – his "clerk-specific" argument – in effect imagines (d)(2) as a game of "hot potato." As long as he is able to hand off a post-conviction petition to the clerk without the clerk tossing it back, he wins, regardless of the nature of the potato/petition in question. If the clerk has it, it is "filed," and if the clerk doesn't give it back, it must be "properly filed."

Under this mechanical view, Pennsylvania's jurisdictional time limit obviously fails to qualify as a "proper filing" requirement. In Pennsylvania, as petitioner points

out, clerks physically accept post-conviction petitions for docketing, without regard to timeliness questions. Qualified judges, rather than lay court employees, then review the many legal questions that arise in applying a filing deadline. Post-conviction petitioners are entitled to appointment of counsel to litigate timeliness issues, and can appeal timeliness rulings to a higher court. All this due process, argues petitioner, in effect makes Pennsylvania's time limit too fair to be a proper filing requirement.

To be sure, petitioner reaches these conclusions by reference to language borrowed from this Court's opinion in *Artuz*. He notes, for example, that *Artuz* relies on the definition of "file" found in Black's Law Dictionary: "to deliver a legal document to the court clerk or record custodian for placement into the official record." 531 U.S. at 8. But in *Artuz* this Court went out of its way to *reserve* the question presented in this case. *Id.* at 8 n.2. The Court's reservation of the issue appropriately recognized that the language used there cannot be presumed sufficient to resolve the status of jurisdictional time limits under subsection (d)(2).

Thus it is necessary to go beyond petitioner's *Artuz* quotation. And Black's itself is an appropriate point from which to carry forward, because in fact it lists another definition of "file," immediately after the first. That *second* definition is this: "to commence a lawsuit." Black's Law Dictionary, 642 (7th ed. 1999). That is exactly what the filing of a post-conviction petition represents: the commencement of a new action. Although the judgment at issue is the same as that in the underlying criminal case, the original proceeding ends with completion of direct review. The defendant must then initiate a new action to

invoke the court's jurisdiction over his sentence. Some ways of doing so are permitted by law; some are not.

Petitioner suggests no possible justification for excising from the statute this second meaning of "filing" as commencement of a post-conviction action. Certainly the legal context in which Congress wrote does not support such an artificially narrow reading. The Federal Rules of Civil Procedure specifically provide that "[a] civil action is commenced by filing a complaint." Fed. R. Civ. P. 3. Habeas petitions are civil actions and, as this Court has recently held, Rule 3 governs habeas actions. *Woodford v. Garceau*, 538 U.S. 202 (2003). Congress well understood, therefore, that its use of the word "filing" conveyed not merely mechanical delivery, but commencement of a post-conviction action.[6]

In this fuller sense of the phrase, "proper filing" is still consistent with the result in *Artuz*, because the procedural bars at issue there did not affect the commencement of the post-conviction action. Those bars came into play only after the post-conviction court's jurisdiction was perfected. They may at that point have prevented relief on particular claims, but they did not deprive the court of power to exercise judicial authority over the case.

Yet "filing" in the sense of commencement is broader than the diminished definition pushed by petitioner. He proposes a universe in which clerks pore over papers with magnifying glasses. If they find a violation of any filing

[6] *See also* Pa. R. Crim. P. 1501 (West 1997), cited in petitioner's brief at 25, reproduced in petitioner's appendix at 10, and titled "Initiation of Post-Conviction Collateral Proceedings."

rules, they must refuse to accept the document. Only if the clerks violate their own rules, by taking possession of a document that their procedures required them to hand back, would petitioner label the filing as improper.

In the real world, however, clerks of court often lack power to refuse acceptance of documents, and are therefore incapable of accepting them improperly. Petitioner notes this to be the practice in Pennsylvania. But it is also true in all federal district courts, where habeas actions are commenced,[7] in the federal appellate courts,[8] and in many states as well.[9] Clerks may point out errors to judges, and those judges may be empowered to dismiss after review; but in the meantime, according to petitioner, the document was properly filed – because, under the marching orders

[7] Fed. R. Civ. P. 5(e) provides: "[t]he clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in the proper form as required by these rules or any local rules or practices." The Advisory Committee Notes, 1991 amendments, explain:

> Several local district rules have directed the office of the clerk to refuse to accept for filing papers not conforming to certain requirements of form imposed by local rules or practice. This is not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this revision. The enforcement of these rules and of the local rules is a role for a judicial officer. A clerk may of course advise a party or counsel that a particular instrument is not in proper form, and may be directed to so inform the court.

[8] Fed. R. App. P. 25(a)(4) (parallel to Fed. R. Civ. P. 5(e)).

[9] *See, e.g.*, Ala. R. Civ. P. 5(e); Ark. R. Civ. P. 5(c)(1); Haw. R. Penal P. 42; R.I. R. Civ. P. 5(e); Vt. R. Civ. P. 5(e).

given to the clerks, they did not act "erroneously" in accepting it.[10]

But if the statute is exclusively about court clerks, as petitioner posits, then the distinction between "filed" and "properly filed" necessarily disappears. Procedures requiring "automatic" filing exist not because clerks are incompetent, but because there really is no such thing as a set of simple "filing rules" that could appropriately be administered without judicial review. Petitioner seems to envision some Platonic ideal of a filing deadline, pure and flat: one week/month/year from final judgment. If Pennsylvania had chosen *that* kind of time limit, hints petitioner, court clerks could have adjudicated it, at the point of delivery, and late petitions therefore would not toll under § 2244(d)(2). If, on the other hand, Pennsylvania instead wants to have a messier deadline, one that takes time and judges to sort through, that's fine too; it's just not a filing requirement under 2244, because filing requirements, according to petitioner, are only about "clerks" and "delivery."

In the real world, of course, the archetypal, easy filing deadline does not exist. When is judgment "final?" Is the

[10] Brief for Petitioner at 29 n.20 (emphasis in original):

> the clerk of court does not act 'erroneously' when s/he accepts a PCRA petition that is ultimately deemed untimely (assuming it is the court in the county where the petitioner was convicted) – under the applicable rules, the clerk *must* accept the petition and transmit it and the record to the judge for review.

Under this reasoning, even cases filed in the wrong court will be "properly" filed, because they were not physically rejected by the clerk. *See, e.g.*, 42 Pa. Cons. Stat. Ann. § 5103(a) (matter commenced in court or district lacking jurisdiction shall be transferred to proper tribunal rather than dismissed).

petition due on the 365th day, or the 366th? Is the petition filed when received by the court, or when delivered to prison officials? What kind of post-deadline amendments may be allowed? These are significant legal issues that are not readily resolved in the federal courts,[11] no less the states. Often they require not just the formulation of new rules, but careful case-by-case application, and even evidentiary hearings. These determinations simply cannot be made upon receipt of a petition by the clerk; there is no choice but to accept the document and permit judicial review. Under petitioner's view, therefore, all such petitions are "properly filed"; no state time limits can qualify as true filing requirements under § 2244(d)(2); and untimely state post-conviction petitions always toll the federal habeas corpus deadline.

The logical endpoint of petitioner's reasoning is revealed by a case from one of the minority circuits employing his approach to the "proper filing" issue. In *Estes v. Chapman*, 382 F.3d 1237 (11th Cir. 2004), the state argued that an untimely post-conviction petition did not toll under § 2244(d)(2), because the state court lacked jurisdiction. The court of appeals rejected that position, in part because "the State conceded at oral argument that Georgia courts do have jurisdiction to determine whether they have jurisdiction," and the petition therefore was properly filed. *Id.* at 1241. All courts, however, have jurisdiction to determine whether they have jurisdiction. The only way to

[11] *Compare, e.g., Burns v. Morton*, 134 F.3d 109 (3rd Cir. 1998) ("calendar" rule), *with United States v. Marcello*, 212 F.3d 1005 (7th Cir. 2000) ("anniversary" rule); *see Mayle v. Felix*, 73 U.S.L.W. 3396 (Jan. 7, 2005) (No. 04-563) (*granting cert.*) (concerning circuit split on standards for amending federal habeas petitions after expiration of filing deadline).

resolve a threshold jurisdictional issue is to accept the filing and conduct judicial review. If such a filing is thereby deemed "proper" – even where the court determines that it never had jurisdiction to entertain it – then lack of jurisdiction is completely irrelevant to the tolling question.

This view not only twists the statute inside out; it also conflicts directly with *Artuz*, the case that petitioner claims as winning precedent. Petitioner says that Pennsylvania's time limit does not "function" as jurisdictional, despite its label. Brief for Petitioner at 29 n.20. What he really means is that jurisdiction itself cannot function as a filing requirement, despite the fact that this Court said exactly the opposite in *Artuz*. Petitioner's "clerk-specific" argument for tolling must fail.

2. "Claim-blind" rules.

But petitioner also has his other challenge to the Pennsylvania time limit – his "claim-blind" argument. This time the game brought to mind by petitioner's position is "no peeking." According to petitioner, real filing requirements, for purposes of § 2244(d)(2), cannot depend in any manner on the identity of the claims contained within a post-conviction petition. A state's filing deadline does not count under the tolling provision unless it is absolute, therefore; no provision can be made for particular claims that might justifiably arise at a later time. Since Pennsylvania's filing deadline does exactly that, it is not really a filing requirement at all under § 2244(d)(2). So every post-conviction petition filed in the state, untimely or not, tolls the federal habeas statute of limitations.

As before, petitioner relies on language from *Artuz* for his claim-blind argument; as before, petitioner fails to

reconcile it with the Court's reservation of the question presented here. The true touchstone remains the statute. Petitioner's position rides on a single word from that source: "application." Because subsection (d)(2) speaks of properly filed "applications" rather than properly filed "claims," it must mean to exclude filing provisions that are in any way specific to particular claims within an application.

So says petitioner; but the habeas statute completely contradicts the contention that "applications" must be treated as monoliths, without regard to their contents. The actual usage of the term is apparent in § 2244 itself. The federal statute of limitations and its tolling provision appear in the same section of the habeas statute as the provision governing second or successive petitions. Subsection (b)(3)(A) provides that the court of appeals must first authorize the filing of such an "application." The authorization is for *applications*, not for *claims*.

How, then, is the court of appeals to decide whether to authorize a second "application?" By determining whether the petitioner has made "a prima facie showing that the application satisfies the requirements of this subsection." § 2244(b)(3)(C). These requirements are spelled out in § 2244(b)(1) and (b)(2). A glance at these provisions, however, shows that, far from implying an all-or-nothing analysis for approving second "applications" – as petitioner would have us expect – the habeas statute in fact requires exactly the opposite. Both (b)(1) and (b)(2) call for identification of individual "claims" – for example, whether "a claim presented in a second or successive . . . application" was previously raised, § 2244(b)(1), or whether a

"claim presented in a second or successive . . . application" relies on a new constitutional rule, § 2244(b)(2)(A).

Accordingly, although the habeas statute plainly requires the court of appeals to make a determination as to "applications," there is no way to apply (b)(3) to applications as a whole. There is no other way than by reference to individual claims. That is how Congress used the word "application" in § 2244 – as a synecdoche for a collection of claims on which the application will rise or fall.

Another example lies even closer at hand, in the first part of the statute of limitations provision itself: § 2244(d)(1). The statute provides that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus." The filing deadline is for *applications*, not for *claims*. How, then, does the deadline apply? The statute lists four ways. The first method, which calculates the one-year period from the date of final judgment, does address the habeas petition as a whole. But every other means of calculating the period permits, or even requires, resort to the nature of an individual claim. § 2244(d)(1)(B) (government impediment to filing); § 2244(d)(1)(C) (new constitutional right); § 2244(d)(1)(D) (new "factual predicate of the claim"). When Congress said "application," therefore, it obviously did not mean to treat the term as a black box. Instead the statute commands the court to open the box and look inside.

But there is more direct proof that Congress did not use the word "application" to require an all-or-nothing analysis – this time within the tolling provision itself. Petitioner focuses on the phrase "properly filed application." He stops short of the critical language. The full passage in § 2244(d)(2) goes further, providing tolling for a properly filed application for review "with respect to the

pertinent judgment ***or claim***." Plainly, Congress went out of its way to mention claims, and to contrast them with judgments. The statute thereby explicitly acknowledges that an application may toll either in relation to the judgment or in relation to individual claims. Petitioner is at a loss to explain how this language can possibly be read to *forbid* any examination of individual claims in determining the propriety of the application – especially in a statute where Congress has just mandated exactly such a procedure for applying the successive petition bar and the filing deadline.

How, then, does the tolling provision avoid the peculiar prospect of an application that is both "properly filed" as to some claims and not "properly filed" as to others? Because, under the statute, all it takes is one. If the petitioner has properly placed before the state court *any one claim* for post-conviction review, he is entitled to tolling of the federal deadline while he litigates in the state. The function of § 2244(d)(2), therefore, is not to decide whether the petitioner will succeed in state court, but merely to determine whether he has gotten in the door. For purposes of § 2244(d)(2), the "application" is proper, even if it contains some claims that are not authorized for review – as long at it contains one that is. Thus to speak of a properly filed petition is to speak of a petition containing at least one claim entitling the court to act.

The Pennsylvania time limit dovetails precisely with this approach. The court is invested with jurisdiction if it finds at least one claim that satisfies the time limit. At that point, the court has authority not only to decide the ultimate question of relief, but to act on ancillary matters. The distinction arises, for example, in the context of stays of execution. If a timely claim has been presented, the

court has power to grant a stay.[12] Other claims in the petition may be outside the filing deadline, and therefore will eventually be dismissed. But they do not affect the court's jurisdiction to act, because the post-conviction action has been properly commenced.

Thus the state time limit looks to the nature of individual claims, but does so, in the first instance, as a gatekeeping function rather than as a condition of relief. That is not to say that such gatekeeping standards must have no effect on the ultimate resolution of individual claims. They may well, but they operate at two levels. The successive petition provision of the federal habeas act illustrates the process. As outlined above, the court of appeals must first consider the statutory standards in order to authorize the petitioner to go forward in district court. Once the petitioner is there, however, the district court must then apply exactly those same standards, and "dismiss" any claim that does not meet them. § 2244(b)(4).

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[12] Thus, the first requirement for a stay of execution under the PCRA

> necessarily includes timely filing pursuant to section 9545(b) and is no more than a threshold jurisdictional requirement. As discussed above, . . . this court explained that the time bar is a jurisdictional requirement. [W]e explained that jurisdictional time limits go to a court's right or competency to adjudicate a controversy. Where a court is without jurisdiction it is without power to act and thus, any order that it issues is null and void. Following this logic, a stay of execution should be granted only where a timely petition is filed, since without a timely filed petition, the trial court is without competency to entertain the matter before it, including the application for a stay of execution.

Commonwealth v. Morris, 771 A.2d 721, 734-35 (Pa. 2001) (citations and internal quotations omitted).

For the few courts following petitioner's absolutist approach, however, this gatekeeping function is not permissible under § 2244(d)(2). In the Ninth Circuit, for example, the law is that a state filing deadline may not consider the merits of individual claims, even to the slightest degree, without forfeiting the protection against post-conviction delay embodied in the federal statute of limitations. This is where the Court's recent decision in *Carey v. Saffold*, 536 U.S. 214 (2002), comes into play. In that case the question was whether the defendant's post-conviction petition was untimely – whether, in the state court's term of art, his delay was "unreasonable." The Ninth Circuit held that the petition must be considered timely, because in dismissing the petition the state court had referred not just to the delay, but to the merits of the petition's claims. Accordingly, said the court of appeals, the defendant was entitled to tolling under § 2244(d)(2).

This Court reversed and remanded. "If the California Supreme Court had clearly ruled that Saffold's 4½-month delay was 'unreasonable,'" held the Court, "that would be the end of the matter, regardless of whether it also addressed the merits of the claim, or whether its timeliness ruling was 'entangled' with the merits." *Id.* at 226.

Petitioner insists that *Carey v. Saffold* has absolutely nothing to do with this case. He says *Carey* was about whether the California post-conviction petition was "pending" for purposes of subsection (d)(2), not whether it was "properly filed." But *Carey*'s significance for this case is not about any differences between the definition of "pending" and the definition of "properly filed." Rather, *Carey* matters because it negates the notion that state timeliness rules must be merits-free. If a state structures its filing deadline so as to "entangle" it with examination of the

substance of a claim, the deadline is nonetheless a condition of review rather than a condition of relief.

Once again it is the successive petition provision of § 2244(b) that demonstrates the point. In order to authorize a second filing, the court of appeals must consider, for example, whether the petitioner has raised a claim controlled by a new, retroactive rule of constitutional law. If the panel concludes that the facts do not fall within the rule asserted, or that the petitioner does not fall within the class entitled to retroactive effect, the case cannot proceed. The panel does not address these questions for the purpose of resolving the merits of the claim, but its determination necessarily means that the claim could not prevail on the merits. Of course not every denial of authorization will have implications for the merits. But whatever the nature of the analysis on particular claims in particular cases, the second petition screening procedure is nonetheless a jurisdictional filing requirement.[13]

Pennsylvania's jurisdictional time limit works in the same manner. It is not always blind to the nature of claims raised in petitions. But the inquiry required by the statute, whether or not it touches on the merits, is still a screening mechanism designed to ensure that the action is properly commenced. Nothing in § 2244(d)(2) penalizes the state for structuring its filing requirement to this effect. Post-conviction petitions filed in violation of the time limit are not properly filed, and do not toll the federal habeas corpus deadline.

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[13] *See, e.g., Alley v. Bell*, 2004 U.S. App. LEXIS 25773 (6th Cir., December 14, 2004) (requirement of pre-authorization to file second habeas petition under § 2244(b) is jurisdictional; where petitioner did not first secure authorization, district court lacked jurisdiction to issue stay of execution).

C. Petitioner's proposed construction of the statute frustrates Congress's intent to prevent delay while permitting exhaustion.

Petitioner's statutory construction argument rested on restrictive reading of two words from § 2244(d)(2) – "filed" and "application" – neither of which, as discussed above, are actually narrow enough to support the result he seeks. Accordingly, petitioner attempts to add breadth to his position with "policy" arguments. These arguments, however, do not even begin to address the policy balance Congress sought to achieve in enacting the federal habeas statute of limitations.

There is no secret: the purpose of AEDPA was not to maximize post-conviction litigation in the state and federal courts. Had Congress wanted simply to "encourage" exhaustion, it could have done so by doing nothing. Before the federal statute of limitations, nothing in the habeas statute kept prisoners from spending as much time as they wished filing state post-conviction petitions; whenever they decided to move on to federal court, the door would still be open. So the one-year filing deadline adopted in § 2244(d)(1) is a *limitation* on exhaustion. It necessarily reduced the opportunity for state court exhaustion by running a clock on the availability of federal habeas review.

The tolling provision of § 2244(d)(2), to be sure, is an exception to the (d)(1) limitation. Congress wanted to maintain some opportunity for additional exhaustion in state court before proceeding to federal court – but only to the degree that states themselves were willing to entertain more litigation. Otherwise there would have been no point in enacting (d)(1) in the first place. As a result, the "proper

filing" requirement is a limitation on the exception. Petitioner seeks to have the limitation largely removed, thereby destroying the intended interplay among the statute's provisions.

1. Delay

As discussed above, petitioner, by defining "filed" to mean nothing more than "received by a clerk," would render virtually all state post-conviction petitions "properly filed." What is left, under petitioner's rationale, is the colorblind clerk who erroneously accepts a petition with a green cover when it was supposed to be blue, until a later clerk with better vision notices the violation and, in accordance with office policy, immediately ships the document back to the hapless applicant. When the prisoner seeks tolling for the two months before the petition was returned to him, subsection (d)(2) emphatically says "no." That, according to petitioner, is what Congress was after when it limited the tolling exception with the words "properly filed."

Meanwhile, the more important filing requirements – the ones the states enact as gatekeepers to ensure the proper invocation of limited post-conviction avenues of review – will be considered by judges after docketing by clerks. Those requirements are not filing rules at all, says petitioner, because they don't govern delivery to and acceptance by the clerk. As a result, petitions filed in violation of such rules are nonetheless "properly filed" under § 2244(d)(2) and toll the federal habeas deadline indefinitely. In effect, therefore, the word "filed" turns around, gobbles up the word "properly," and can now go on to consume all of (d)(1) for good measure.

Significantly, in presenting his policy arguments petitioner does not really hide his desire for such an outcome. Indeed, he suggests that the "proper filing" provision is a bad thing, because prisoners seeking state post-conviction review will not be sure in advance whether their petitions are properly filed. While the state courts adjudicate the matter, petitioner protests, the federal deadline may be passing. Brief for Petitioner at 30.

Petitioner specifically attributes these results to the supposed "harshness" in requiring litigants to file their state petitions on time if they wish to claim tolling under subsection (d)(2). But in truth there is no way to define the phrase "properly filed" so as to avoid the uncertainty that petitioner pleads. Even if (d)(2) did not cover any type of time limit, but instead encompassed only the most mechanical state filing requirements, there might still be contested rulings. And as long as litigation was ongoing in state court, a prisoner could claim confoundment about the status of his federal habeas deadline. The only way to solve the "problem" entirely would be to remove the word "properly" from the federal statute – which is exactly what petitioner tries to do.

Petitioner's other policy challenge is of a similar nature. He argues that he has been deprived of a "safety valve," because, unlike the doctrine of procedural default, a statute of limitations violation cannot be overcome by showing cause and prejudice. Brief for Petitioner at 30-31. Once again, however, petitioner is attacking the statute itself rather than the application of the proper filing provision to the facts of his case. Congress obviously chose not to place a cause and prejudice exception in the statute of limitations. Petitioner seems to want the Court to

override that choice by finding some way to interpret (d)(2) such that a statute of limitations violation never results.

Petitioner proposes these positions as if there were no cost to them. But there is a cost: the post-conviction delay that Congress was trying to restrain. The incentive for delay is not confined to the capital context. The defendant with confidence of a winning claim has little motive to wait; his interest is in prompt litigation and prompt release or resentencing, whether that sentence is death or something less. If, on the other hand, he does not believe he has exhausted a claim that will achieve success on federal habeas review, and if there is no penalty for postponing his habeas petition, then the smarter course may be to try again in state court, however long the odds. In the meantime, good things can happen: new witnesses may appear with fresh memories of events; new legal aid may arrive with fresh theories of litigation.

Petitioner's construction of the tolling provision thus permits those with a motive for delay to indulge it without fear of jeopardizing their federal habeas deadline. Worse, petitioner would encourage delay even by those who may not otherwise be disposed. The federal habeas statute of limitations contains no provision for extensions. Under petitioner's approach, however, prisoners who want more time would be able to give themselves their own extensions – simply by filing an untimely state post-conviction petition.

This is not what AEDPA intended. Congress chose to move the post-conviction process along by placing an outside limit on it. Contrary to petitioner's sentiments, the statute cannot fairly be construed as if delay were not an issue.

2. Exhaustion

In limiting the time for post-conviction litigation, however, Congress did not completely extinguish the opportunity for newly-arising claims. The habeas statute recognizes that certain claims may not be available within one year of final judgment, through no fault of the petitioner. Congress therefore made specific allowance for claims blocked by government impediment, claims based on new constitutional rules, and claims based on previously unobtainable factual predicates. § 2244(d)(1)(B)-(D).

Pennsylvania has adopted these same provisions within its own filing deadline. 42 Pa. Cons. Stat. Ann. § 9545(b)(1)(i)-(iii). By doing so, the state ensures the fairness of its own post-conviction process. But the statute also seeks to provide a state forum for exactly those claims that petitioners will be entitled to raise in federal court under the AEDPA statute of limitations.

Yet petitioner's interpretation of the federal tolling provision – for all his talk of the importance of exhaustion – would jeopardize what he says he desires. Petitioner spends the bulk of his brief attacking the Pennsylvania time limit because it has "exceptions" – the three provisions for newly-arising claims. In reality, these "exceptions" admit into the filing deadline no discretion or delegation of authority to judges. Instead, they in effect create supplemental time periods for seeking post-conviction review. These new periods pop up at any point in the future when triggering events occur after expiration of the initial one-year time limit following direct review. But no matter, says petitioner: the "exceptions" are bad because they focus on individual claims, rather than the "application" as an indivisible unit.

Under petitioner's view, then, the state has two options. Keep the "exceptions" – in which case the filing requirement isn't really a filing rule for purposes of § 2244(d)(2), and all untimely state post-convictions will automatically toll the federal habeas deadline. Or dump the exceptions – in which event petitioners will have no recourse in state court for legitimate new claims, and exhaustion will be impossible. Clearly, this is not what Congress intended. The whole point of subsection (d)(2) is to bring post-conviction delay under control while still providing a window of opportunity to exhaust previously unavailable claims.

Petitioner hints at a way out for the state: a "pre-filing" procedure, akin to the federal successive petition rule or certificates of appealability. With pre-filing, presumably, the state could have its exceptions but still enforce the time limit as a 2244(d)(2) filing rule, because, after all, petitions would not be "filed" until after they were reviewed to see if they met the timeliness requirements. As a result, there would be no tolling unless and until the pre-petition was approved to become a petition.

Why a "pre-filing" label should make a difference, however, is less than clear. Section 2244(d)(2) provides tolling for applications "for state post-conviction or other collateral review." If all states adopt post-conviction pre-filing procedures, surely the argument will be made that requests for authorization are themselves "applications . . . for collateral review" that entitle the petitioner to tolling. If pre-filing is compulsory, if it is a necessary first step in the post-conviction review process, that argument will have some force.

If this tolling argument prevails, however, then pre-filing procedures will have had exactly the opposite of the

intended effect: *all* prisoners seeking permission to proceed will receive tolling while their requests are pending, even if those requests are eventually denied. On the other hand, if requests for authorization do *not* themselves toll, then many prisoners will watch their federal habeas rights expire while they wait for state courts to determine if they have met the necessary "pre-filing" standards. Either result would defeat the purpose of § 2244(d)(2).

The quandary is unnecessary, because in essence Pennsylvania already has a kind of "pre-filing." The time limit itself is a threshold standard for the exercise of post-conviction jurisdiction. That is what makes the statute a filing requirement within the meaning of § 2244(d)(2); and that is why untimely petitions are not "properly filed." Putting trappings on the procedure, by adding a new label or a separate "pre-reviewer," will only make the tolling problem worse, either for the state or for the petitioner. Subsection (d)(2), correctly applied in the context of the Pennsylvania time limit, provides the appropriate balance between delay and exhaustion.

Even if it were appropriate for the Court to tip the statutory balance, however, the less intrusive alternative would be that offered in another case before the Court this Term, *Rhines v. Weber*, No. 03-9046 (argued January 12, 2005). In *Rhines* the petitioner contends that, if a state prisoner files a timely federal habeas petition, but says he has more claims to litigate in state court, the habeas judge should stay the federal proceedings rather than dismiss, so that the petitioner does not lose the benefit of his original federal filing date. *Rhines* is thus the converse of this case, in which the petitioner filed an untimely federal habeas petition after using up all the available time pursuing

improper state litigation, and now asks this Court to rule that the federal period never even started running.

Rhines's position, at least, does somewhat less violence to the text and operation of the federal habeas statute. The exhaustion provision, § 2254(b) and (c), does not explicitly address the stay issue either way. Petitioner's argument, in contrast, requires erasing the word "properly" from 2244(d)(2), and distorting the word "application." With stay and abeyance, moreover, a judge might retain some ability to monitor the applicant's diligence. Petitioner's position, on the other hand, gives him complete control, because he can unilaterally reset the federal deadline simply by filing untimely state petitions. Finally, the stay-and-abeyance petitioner can at least point to one timely-filed petition – the federal habeas application; whereas in cases like this one the petitioner was untimely both in state court *and* in federal court.

In considering stay and abeyance, however, there is one important caveat not directly discussed in the *Rhines* briefs. Rhines addresses stay and abeyance as an all-or-nothing proposition, presumptively available to anyone who says that he needs more time to exhaust additional claims in state court. Yet, as Rhines concedes in his reply brief,

> in the vast majority of cases, there is no remaining state court remedy available to the petitioner by the time he arrives in federal court, either because the state limitations period has expired, or the relevant state rules prevent the filing of a second application for post-conviction relief. In these cases, any claims not previously presented to the state courts provide no occasion for stay-and-abeyance.

Reply Brief for Petitioner, *Rhines*, at 11-14 (footnotes omitted).

Accordingly, no stay should issue under *Rhines* unless the petitioner first makes a definitive showing that a state court remedy remains available to him for unexhausted, cognizable claims. Absent this condition, there is absolutely no basis for halting the proceedings, under Rhines's own rationale. Such a requirement will not mire the federal judge in state law issues, because the judge would have to face those issues anyway in addressing exhaustion and procedural default.

If the federal court grants a stay, it should revisit the issue as the petitioner moves through state court and rulings are made there on the availability of review. If the federal court denies a stay, the claims are procedurally defaulted and the petitioner can raise them in his federal habeas petition through the cause and prejudice standard. Or, if he chooses, he is free to proceed simultaneously in state court, and to ask the federal judge to reconsider the stay question if it appears that he will achieve review at the state level.

Such a procedure may not assure federal habeas review for every previously unexhausted claim in every possible scenario. But there is no fair reading of the statute of limitations that can do that. The purpose of a limitations period is not to guarantee review but to end it at some point. Section 2244(d)(2) will never interfere with a prisoner's ability to litigate a direct appeal and a first PCRA petition filed within a year of the appeal. When, however, the petitioner attempts to go beyond his one full round of direct review *and* one full round of collateral review, difficulties may be inevitable. The language and purpose of the tolling provision should not be garbled in order to avoid the AEDPA limitations period.

II. Petitioner's various excuses do not justify the "equitable tolling" he seeks.

Absent the statutory tolling to which he was not entitled, petitioner falls within the AEDPA one-year "grace period" for filing a federal habeas corpus petition.[14] His habeas petition was due by April 23, 1997. He filed it on December 22, 1999. To explain the untimeliness, petitioner blames the law for not speaking to him more clearly. He says that the habeas deadline should be "equitably tolled" for all the time he was not sure about the proper litigation course to pursue.

The doctrine of equitable tolling, where it applies at all, cushions the impact on a litigant who was actively

[14] Petitioner's amicus argues that federal courts were without authority to establish a grace period, and that without it the AEDPA statute of limitations is unconstitutional as applied to convictions that became final before its enactment. Counsel of record for the amicus is a Philadelphia defense lawyer who raises this issue regularly in certiorari petitions before this Court. *Brinkley v. Gillis*, 73 U.S.L.W. 3397 (Jan. 10, 2005) (*denying cert.*); *Lively v. Kyler*, 125 S. Ct. 280 (Oct. 4, 2004) (*denying cert.*); *Hubley v. Kelchner*, 540 U.S. 914 (Oct. 6, 2003) (*denying cert.*). Review of the certiorari papers in this case, however, does not reveal the question among those on which review has been granted. In any case, the claim is frivolous. *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596 (1873) (courts will presume legislative intent to run limitations period from date of enactment for previously accruing actions).

Petitioner's amicus similarly argues that Pennsylvania's PCRA deadline is unconstitutional because, although the "grace period" there was created by statute (Laws of Pennsylvania, Act 1995-32 (1st Spec. Sess.), Sections 3-4) it is too short. This claim too is not among the questions on review here, nor does petitioner argue it now. The Pennsylvania Supreme Court, however, did soundly reject such a due process claim in another case, pointing out that the successive petitioner there had already had one round of collateral review, and that the new statute permits review for claims that were previously unavailable. *Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998).

prevented from meeting a statutory deadline. *E.g., International Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 237 n.10 (1976). Petitioner writes at length about why he didn't think he was compelled to go forward earlier. But he is unable to identify any *impediment* to doing so. He simply did not want to have to make a difficult litigation choice, a choice that – like all choices – may have required him to give up one set of options or another. To apply equitable tolling here would be an abuse of the doctrine.

A. Petitioner was not entitled to equitable tolling where he sat on his "new" claims for four years before Pennsylvania even adopted a post-conviction filing deadline.

Petitioner's entire argument for equitable tolling rests on discussion of various cases addressing the Pennsylvania post-conviction filing deadline following its implementation in 1996. Even assuming that uncertainty about the law could ever qualify as an impediment for equitable tolling purposes – but see below – petitioner's claim would fail before it even got there.

There is a threshold question: where was petitioner *until* 1996? His first post-conviction petition, the proper one, was finished by 1992. Had he wished to file another then, it too would have been properly filed; the Pennsylvania time limit did not come into effect until 1996. And had he done that, petitioner would have completed his new round of state post-conviction litigation with ample opportunity to file a timely federal habeas petition.

Petitioner's brief is entirely silent on the consequences of this delay, as if it doesn't count. But it does count. There is nothing equitable about tolling a deadline for someone

who never would have needed it but for his own failure to act, over a period of four years. It is true that he was not specifically *invited* to file a new post-conviction petition during this period, but absence of invitation is not an impediment to filing that would justify equitable tolling.

In state court petitioner eventually did make an allegation about this period of delay. His excuse there, however, fails on its face to explain away the four years. What petitioner asserted was that his personal copies of legal papers were destroyed in a prison riot – in 1989. Petitioner failed to note that, at the time, he was still in the midst of his first post-conviction review. New counsel had recently been appointed to represent him, and had just filed an amended petition. Petitioner later testified at an evidentiary hearing, with counsel, in 1991, and litigated an appeal, with counsel, through 1992.

Given the status of his case, it is most difficult to imagine how petitioner was prejudiced by the alleged loss of his personal legal file. Certainly he has never specified any harm. Nor has he ever explained why he did not just ask his lawyer for extra copies, if they were so important. In fact, he has never even said what the papers were.

But there is no need to wonder about the documents, because, when petitioner finally did file another petition, in 1996, its contents made perfectly clear that the delay was without cause. The new petition contained three claims. One was an argument that life sentences are illegal under Pennsylvania law because of the interplay of various state statutes. Since these statutes were all in existence when petitioner was sentenced in 1986, they can hardly justify petitioner's failure to mention the issue until 1996.

Next petitioner claimed his plea was invalid because he hadn't understood that he would be ineligible for parole, and his lawyer at the plea was therefore ineffective. This was a repeat of the primary claim in petitioner's first post-conviction petition, dressed up with "new" witnesses. The problem is that the witnesses were petitioner's parents and brother, and their allegations were about a meeting with counsel – and petitioner himself – that took place in 1986. Hard to argue that this was newly discovered evidence, and petitioner doesn't try.

Finally petitioner claimed that counsel on the first post-conviction petition was ineffective. The ineffectiveness charge centered on the contention that post-conviction counsel should have summoned petitioner's original lawyer to testify, at the post-conviction evidentiary hearing held in 1991, about what the lawyer told petitioner before his plea. Petitioner, of course, was at the 1991 hearing; indeed, he says, while there he specifically asked post-conviction counsel to call the prior lawyer to the stand. J.A. 191. Once again, therefore, petitioner is in no position to contend that he only discovered this ineffectiveness issue in 1996.

In reality, then, events after 1996 are an irrelevant diversion. All of the claims petitioner raised in his second petition could have been exhausted, at any time over the four years previous, without the least concern for time limits. The only reason petitioner faced the task of sorting out the new state and federal deadlines is because he did not act earlier. If "equitable tolling" can save him even from that, then the phrase has no meaning at all.

B. Petitioner was not entitled to equitable tolling where his additional state litigation, even had it been timely, would not have produced more federal claims.

This is the box petitioner tries to construct for himself: federal law told him he must pursue additional review in state court before coming to federal court; state law told him he could do so; his expectations were defeated; he is therefore entitled to equitable tolling to make things right. As discussed below, petitioner has misstated the state and federal law. But there is a more immediate problem: there was no box.

Instead there were alternative paths. Rather than jeopardize his federal habeas rights by pursuing questionable state litigation first, petitioner could have done both in parallel, or could have dropped his "new" claims to pursue in federal court the claims he had already exhausted. Petitioner never explains why he should not have had to choose, why he was entitled to have it all without risk.

One of the dangers of this mindset is illustrated here: petitioner wasted his time in state court pursuing "new" claims that could not have been brought to federal court anyway. As noted above, petitioner raised three issues in his 1996 second state post-conviction petition.

The first was his argument that state law required parole even for life sentences. When petitioner initially made this contention, he put it in federal terms as well: he said that, because the life sentence violated state statutes, it thereby violated federal due process. J.A. 192. When he appealed from denial of the 1996 petition, however, petitioner abandoned the federal aspect of the claim in order to concentrate on the state law issue, which, he argued,

was "non-waivable." J.A. 256-66. When he sought discretionary review in the state supreme court, petitioner again presented the illegal sentence claim in purely state law terms. J.A. 342-53. Even if he had been timely, therefore, the only issue that would have been fairly presented through the state court system was non-cognizable on federal habeas review.

The second of the three claims in petitioner's 1996 post-conviction petition was his challenge to the validity of his plea and the effectiveness of his trial counsel. This surely was a federal issue. But it had already been exhausted, by petitioner's first state post-conviction petition, which was done in 1992. To be sure, petitioner attempted to add "new" evidence the second time around. But, even had there been no time limit, he could not have used the second petition to relitigate the guilty plea/ineffectiveness claim on the basis of facts that were plainly available years before. *See, e.g., Commonwealth v. Pirela*, 726 A.2d 1026, 1031-32 (Pa. 1999) (where defendant previously challenged validity of jury waiver colloquy, he could not relitigate issue on collateral review on basis of new affidavit).

The final claim in the 1996 post-conviction petition was an ineffectiveness attack against counsel in petitioner's previous round of state collateral review. However, there is no such claim on federal habeas review. 28 U.S.C. § 2254(i).

Accordingly, petitioner could not in fact have gotten anywhere by going back to state court in 1996, even if the state filing deadline had not applied. He could not have exhausted additional claims for federal review. Because he thought he should not have to choose, he let the federal deadline pass. Equitable tolling should not be employed to vindicate that kind of litigation conduct.

C. Petitioner was not entitled to equitable tolling where he ignored the state filing deadline, and delayed filing his federal habeas petition, on the ground that the state statute was not sufficiently "clear" until every possible argument against it had been eliminated by the highest court.

Petitioner contends that the state courts lured him into believing he was immune from the state post-conviction filing deadline. The federal courts, he claims, egged him on. Even in the light most favorable for himself, however, petitioner can say no more than things like this: "it was not at all clear" that his new state petition was untimely; it affirmatively appeared that he "might" get more state merits review; state law "left open the possibility" that additional exceptions would apply. Brief for Petitioner at 21, 40.

Of course, if it was not clear that he was untimely, then it was not clear that he was timely. If he might get more review, then he might not. If the law left open the possibility of exceptions, then it also left open the possibility of no exceptions.

The reality is that, once the state deadline was enacted, the news was not good for defendants seeking more rounds of post-conviction review. With each subsequent legal development, the news got worse. Yet petitioner ignored every one. At any of these stages, petitioner could have eliminated the threat to his federal rights of review by filing a habeas petition – whether or not he withdrew his rapidly diminishing hopes in state court. Equitable tolling is not an umbrella policy to protect litigants from known risk.

The first and loudest message, of course, came when the legislature passed the new post-conviction time limit in November 1995, after many months of hearings and debate. Petitioner let pass the 60-day grace period for previous litigants, instead waiting for good measure until November 1996 to file his new post-conviction petition. Petitioner has *never* claimed ignorance of the filing deadline (which wouldn't have warranted tolling in any case). On the contrary, his explanation has been all along that he filed late because he had legal arguments that the courts might accept to exempt him from the deadline. As he declared in his briefs, he therefore "did not feel compelled to immediately file his current PCRA petition, especially since he was unprepared to do so" (because of those legal papers he lost seven years earlier). J.A. at 320-21, 341, 411.

Whatever petitioner's theories may have been, however, the legal system was marching on. In May 1996, the Pennsylvania Supreme Court's criminal rules committee published a proposal to incorporate the new deadline into the procedural rules governing post-conviction petitions. 26 Pa. Bull. 2296. In August 1997 the state supreme court officially adopted the published rules. 27 Pa. Bull. 4298. Of course the new rules did not explicitly exclude every possible argument against application of the time limit. But for those, like petitioner, claiming to rely on the court's supposed history of circumventing statutory provisions, the rule change was not a good sign.[15]

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[15] In his statement of the case, Petitioner misleadingly suggests that the new rules were somehow unclear about the filing deadline. Brief for Petitioner at 7. His appendix includes only the old, pre-deadline rules, which of course do not mention the time limit. As amended, however, Pa. R. Crim. P. 1501 (now renumbered as 901),

(Continued on following page)

Then in December 1997, the Pennsylvania Superior Court – the intermediate appellate court – issued the first published opinion applying the new filing deadline. The court made clear what had been apparent on the face of the statute: that the time limit was not like existing procedural bars; that it was jurisdictional; that the courts were without power to disturb the legislative scheme. *Commonwealth v. Alcorn*, *supra*, 703 A.2d at 1057.

Even at that point, however, petitioner did not reconsider his strategy of staying in state court and delaying a federal habeas petition. Instead, he insisted that *Alcorn* did not apply to already-filed petitions attacking convictions that became final before enactment of the new filing deadline. J.A. 302, 305. But that is exactly what the court in *Alcorn* did: it applied the deadline to a previously filed petition challenging a previously final conviction. *Id.* at 1055.

Today petitioner argues that he could safely ignore *Alcorn*, because the intermediate court's ruling was not the last word on validity of the filing deadline. Actually, though, the Pennsylvania Supreme Court has only discretionary review over non-capital cases, and in fact denied review in *Alcorn* in June 1998. *Commonwealth v. Alcorn*, 724 A.2d 348 (Pa. 1998) (mem.). For all petitioner knew,

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clearly states that "[a] petition for post-conviction collateral relief shall be filed within one year of the date the judgment becomes final, except as otherwise provided by statute."

In any case, to reiterate, petitioner has *never* claimed ignorance of the time limit – whether in relation to the statute itself, the language of the one-year grace period provision, the content of the rules of procedure, or the terms of the standard PCRA form. That is apparently why all of these insinuations appear only in his statement of the case, and not in his argument section.

the Superior Court was indeed the last word; he just chose not to heed it.

Petitioner responds that he could not simply abandon his petition, even once the state courts indicated it would be rejected as untimely, because he had to present his claims to all levels of the court system in order to properly exhaust them. Brief of Petitioner at 46 n.36. This is a non sequitur that goes to the heart of petitioner's position. Because the post-conviction petition was in violation of the jurisdictional time limit, it *couldn't* serve to exhaust claims – no matter how long petitioner spun them around in state court. Petitioner simply chose not to protect himself by filing in federal court on his previously exhausted claims. Now he expects this Court to absolve him of his blind wager.

In any case, petitioner's subsequent behavior shows that he was not about to take heed from the Pennsylvania Supreme Court anyway. In December 1998, six months after denying review in *Alcorn*, the state supreme court issued its own opinion applying the filing deadline as a limit on the jurisdiction of the courts. *Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998). Petitioner says he could disregard that decision too, because it did not explicitly reject all the excuses previously used to step around non-jurisdictional procedural bars. Petitioner was free to look at it that way if he wished – but only at his own risk.

Finally, in August 1999, the state supreme court issued an opinion apparently good enough for petitioner. In *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 1999), the court rejected a laundry list of purported non-statutory exceptions to the filing deadline. The court pointed out, as had the *Alcorn* court two years before, that statutory, jurisdictional time limits cannot be modified by judges.

In pretending good faith reliance on this new decision, however, petitioner overlooks several facts. First, by this point the state supreme court had already denied review of the untimeliness ruling in petitioner's *own* case. Surely that might have been an indication of whether the court would spare him from the post-conviction time limit.

Moreover, petitioner dragged his feet even after the *Fahy* case. Once that decision came down, even he realized, he says, that his petition was jurisdictionally out of time – meaning that it had never been properly before the state courts, and that the federal habeas deadline had not been tolled. Rather than rush to invoke his federal rights, however, petitioner dallied for another five months before he filed a habeas petition, in which he merely retyped the allegations in his state court filings.

Finally, petitioner's filings had challenged the time limit not just on state law grounds, but as a violation of the Due Process Clause of the Fourteenth Amendment. J.A. 307, 338-39, 415-16. If petitioner really thought he was entitled to equitable tolling until the highest court delivered the "last word" on all possible arguments, he should still be waiting for "clarity." The truth is that Pennsylvania law did not cause petitioner's delay. He just missed the deadline.

Nor is Third Circuit precedent to blame for petitioner's lateness. According to petitioner, he was entitled to ignore Pennsylvania law about its own time limit, because the Third Circuit kept telling him the state courts might well not enforce the deadline. This is bunkum.

Petitioner first invokes *Doctor v. Walters*, 96 F.3d 675 (3d Cir. 1996). But *Doctor* was a case that came to federal court a year before the Pennsylvania filing deadline was even enacted. It couldn't have told petitioner anything

about whether he would be able to get around the state time limit.

Next petitioner cites *Banks v. Beard*, 126 F.3d 206 (3d Cir. 1997). *Banks*, however, focused exclusively on the Pennsylvania Supreme Court's treatment of procedural bars in *capital* cases. Beyond that it merely directed litigants back to state law on the filing deadline as it developed. *Banks* did not remotely suggest that petitioner could disregard state cases like *Commonwealth v. Alcorn*, the first Pennsylvania opinion on the filing deadline; indeed, *Banks* was decided three months before *Alcorn* even appeared.

Petitioner also relies on *Lambert v. Blackwell*, 134 F.3d 506 (3d Cir. 1997). But *Lambert* specifically contrasted Pennsylvania's non-jurisdictional procedural bars, which had long been on the books, with the new jurisdictional filing deadline. Indeed, in a passage that petitioner carefully doctors in his brief, *Lambert* commented on the state courts' willingness to depart from statutory language only in relation to "the *prior* statute which did *not* contain a statute of limitations." *Id.* at 524 n.33 (emphasis supplied).

These early cases hardly stand for the proposition that petitioner was entitled to pursue an untimely state petition for three years, from 1996 to 1999, and then expect a free pass into federal court. Indeed the Third Circuit later held that any possible confusion about the state filing deadline was cleared up by the state court's *Alcorn* decision in 1997, and that equitable tolling of the federal habeas deadline was unavailable thereafter. *Walker v. Frank*, 56 Fed. Appx. 577 (3d Cir. 2003) (not precedential) (Becker, C.J.).

The real problem with petitioner's false reliance on federal cases, and with his equitable tolling demand

generally, is his expectation that exhaustion trumps all. Petitioner did not have some kind of constitutional right to delay federal habeas proceedings in order to exhaust more claims in state court. On the contrary: exhaustion is a Congressional mandate, and it exists to protect the interests of the state, not the petitioner. By enacting post-conviction statutes of limitations, Congress and the states chose to *change* things. They did not *want* to provide endless opportunities for exhaustion anymore, because the cost of delay was too high. Equitable tolling for petitioner is nothing but an end run around those legislative policies. His claim should be denied.

CONCLUSION

For the reasons set forth above, respondent respectfully requests that this Court affirm the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Supreme Court of the United States

JOHN A. PACE,

Petitioner,

v.

DAVID DiGUGLIELMO, Superintendent,
State Correctional Institution at Graterford,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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ARGUMENT[1]

I. STATUTORY TOLLING IS APPROPRIATE.

Petitioner's Post-Conviction Relief Act ("PCRA") petition was "properly filed." *See* Pet. Br. Arg. § I, discussing, *inter alia*, 28 U.S.C. § 2244(d)(2) and *Artuz v. Bennett*, 531 U.S. 4 (2000). The PCRA time-bar functions in all material ways like the procedural bars addressed in *Artuz* – *e.g.*, no precondition on filing; ordinary judicial review, including appellate review; claim-by-claim operation; availability of relief on the merits in some cases. *See* Pet. Br. at 22-29.[2]

A. Respondent says the PCRA time-bar "works in the same manner," Resp. Br. at 28, as AEDPA's pre-filing procedure for successive habeas petitions, 28 U.S.C.

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[1] All emphasis herein is supplied unless otherwise indicated. The Joint Appendix and the Appendix to Petitioner's Brief are cited as "JA" and "App." The briefs for Petitioner, Respondent and the *amici* State of Alabama, *et al.*, are cited as "Pet. Br.," "Resp. Br." and "Ala. Br."

[2] As *Artuz* explained, the claim-by-claim operation of a state court procedural bar rule is significant because § 2244(d)(2) "refers only to 'properly filed' *applications* and does not contain the peculiar suggestion that a single *application* can be both 'properly filed' and not 'properly filed'" when some *claims* in the application might be barred and some might not. *Artuz*, 531 U.S. at 9-10. Respondent essentially asks this Court to overrule *Artuz*, asserting that *Artuz*'s distinction between "application" and "claim" is illusory because § 2244(d)(2) refers to a "properly filed application . . . with respect to the pertinent judgment or claim." *See* Resp. Br. at 24-25. But § 2244(d)(2)'s use of "judgment or claim" accounts only for the fact that AEDPA's limitations period starts on different dates – it usually starts on "the date on which the *judgment* became final," § 2244(d)(1)(A), but it may start later for some claims if one of the triggers in § 2244(d)(1)(B-D) occurs. In either context, § 2244(d)(2) refers to a "properly filed *application*" not, as Respondent suggests, an "application" containing a "properly filed" "claim."

§ 2244(b)(3).[3] This Court identified § 2244(b)(3)'s pre-filing requirement as a paradigmatic "condition to filing" in *Artuz*, 531 U.S. at 9. The differences between § 2244(b)(3)'s pre-filing requirement and the PCRA time-bar highlight that the PCRA time-bar is *not* a "condition to filing" and does *not* "work[] in the same manner" as AEDPA's pre-filing rule.

First, under AEDPA, filing a successive habeas petition requires *pre-approval* from the court of appeals under § 2244(b)(3). There is no such pre-condition or barrier to filing a PCRA petition, which can be filed at any time. *See* Pet. Br. at 25.[4]

[3] Section 2244(b)(3) states in pertinent part:

> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> * * *
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

[4] Respondent says § 2244(b)(3) allows the court of appeals to examine the claims in the proposed habeas petition to determine if it will allow the petition to be filed. *See* Resp. Br. at 23-25, 28. But Respondent ignores the fact that the "condition to filing" embodied in § 2244(b)(3) is the *court of appeals' approval* – once the court of appeals allows a petition to be filed, the entire petition by definition is "properly

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Second, AEDPA's pre-filing requirement is a true "gatekeeping" or "screening" device. *Felker v. Turpin*, 518 U.S. 651, 657, 664 (1996). The court of appeals filters out habeas petitions that do not make a "prima facie showing" of eligibility for relief, *see* § 2244(b)(3)(C), thus prohibiting them from being filed at all. If the court of appeals finds that the petition survives this prima facie screening, it permits the petition to be filed and leaves it to the district court to make an actual ruling on the merits. *See* § 2244(b)(4) ("district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section"). The PCRA has no such "screening" or "gatekeeping" mechanism.

Third, AEDPA's pre-filing determination is made quickly – the court of appeals must decide whether to authorize filing a habeas petition within 30 days, *see* § 2244(b)(3)(D), and there is no appeal, rehearing or certiorari from the court of appeals' decision, *see* § 2244(b)(3)(E). In contrast, under the PCRA there are several procedures in the Court of Common Pleas (*e.g.*, appointment of counsel, briefing, arguments, hearings); then proceedings on appeal (*e.g.*, appeal as of right in the intermediate appellate court and further discretionary review in the state supreme court); and the state courts can take years before ultimately ruling whether the petition is timely or not.[5]

filed." Moreover, the court of appeals may specify which claims it finds appropriate to go forward.

[5] *See Commonwealth v. Cruz*, 852 A.2d 287, 289-91 (Pa. 2004) (petition filed in July 2000; dismissed as untimely by trial court in

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These differences highlight that the PCRA time-bar acts neither as a "screening mechanism designed to ensure that the action is properly commenced," Resp. Br. at 28, nor as a "kind of 'pre-filing' " requirement, Resp. Br. at 35.

B. Respondent emphasizes the "jurisdictional" label the Pennsylvania Supreme Court ultimately gave the PCRA time-bar. *See* Resp. Br. at 4-5, 7, 9-10, 12-18, 25-28, 35. But the only effects of this label are: (1) the state courts no longer provide non-statutory exceptions to the time-bar; and (2) the state courts may raise the time-bar *sua sponte*. *See* Resp. Br. at 14. Neither effect makes the PCRA time-bar a condition to filing. Further, the PCRA's "waiver" provisions, which Respondent agrees are *not* conditions to filing, *see* Resp. Br. at 10, now are given the same two effects by Pennsylvania's courts.[6]

February 2001; untimeliness ruling affirmed by Superior Court in February 2002; remanded for evidentiary hearing on timeliness by Pennsylvania Supreme Court in June 2004); *Commonwealth v. Robinson*, 837 A.2d 1157, 1159-60 (Pa. 2003) (petition filed in July 1999; dismissed as untimely by trial court in August 1999; reinstated as timely by trial court in February 2000; found timely by Superior Court in July 2001; dismissed as untimely by Pennsylvania Supreme Court in October 2003); *Commonwealth v. Williams*, 828 A.2d 981, 982-87 (Pa. 2003) (petition filed in January 1997; trial court held "extensive hearings" on merits of claims, then dismissed as untimely in December 2001; found timely by Pennsylvania Supreme Court in July 2003); *Commonwealth v. Fenati*, 748 A.2d 205, 206-07 (Pa. 2000) (petition filed in January 1997; trial court held evidentiary hearing and ruled on merits; Superior Court dismissed as untimely; Pennsylvania Supreme Court found timely); *Commonwealth v. Lambert*, 765 A.2d 306, 316-23 (Pa.Super. 2000) (trial court held weeks-long evidentiary hearing on merits of claims, addressed all claims on merits in lengthy opinion and did not apply time-bar; Superior Court found all claims untimely).

[6] *See Commonwealth v. Bracey*, 795 A.2d 935, 941 (Pa. 2001) ("we now require strict adherence to the statutory language of the PCRA, and will afford post-conviction review only where a petitioner shows

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C. Respondent and his *amici* claim support from *Carey v. Saffold*, 536 U.S. 214 (2002). *See* Resp. Br. at 27-28; Ala. Br. at 8-10. But *Saffold* said nothing about the meaning of "properly filed" – it held that there may be nothing "*pending*" during a gap between state court proceedings when nothing is filed in a state court. *See* Pet. Br. at 32-33. In *Saffold*, the *State agreed with Petitioner here* that a post-conviction application ultimately deemed untimely by the state courts is nevertheless "properly filed" throughout the time the application is before a state court awaiting a decision – at least when, as in Pennsylvania, the petitioner can file the application at any time and the state court reviews it for timeliness. *See Carey v. Saffold*, No. 01-301, Reply Brief, 2002 WL 221020, *6 n.2 (U.S. Feb. 8, 2002).

D. Respondent offers a different definition of "file" – *i.e.*, "to commence a lawsuit," Resp. Br. at 17 (quoting Black's Law Dictionary (7th ed. 1999) – than that used in *Artuz*, 531 U.S. at 8 ("[t]o deliver a legal document to the

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that the statutory exceptions to waiver in the PCRA apply"); *Commonwealth v. Davis*, 573 A.2d 1101, 1105 (Pa.Super. 1990) ("The fact that the question of waiver has not been raised by the Commonwealth or the PCRA court does not foreclose this Court from doing so *sua sponte*.").

Respondent also refers to the PCRA's restrictions on stays of execution. *See* Resp. Br. at 26 & n.12 (quoting *Commonwealth v. Morris*, 771 A.2d 721 (Pa. 2001)). But these restrictions arise from specific anti-stay language in the PCRA, *see* 42 Pa.C.S. § 9545(c)(2) ("no stay may be issued unless a petition for postconviction relief which meets all the requirements of this subchapter has been filed"), not from the "jurisdictional" label ultimately given the time-bar. As the Pennsylvania Supreme Court noted in a passage omitted from Respondent's *Morris* quotation, "the legislature intended that in order for a stay to be granted, the underlying petition must *also* meet the pleading and proof requirements as set forth in 42 Pa.C.S. § 9543," *Morris*, 771 A.2d at 734 n.14, which are *not* jurisdictional, *see* Resp. Br. at 10 & n.2, 12-13.

court clerk or record custodian for placement into the official record"). Petitioner's PCRA petition was "properly filed" under *Artuz*. It was also "properly filed" under Respondent's definition. Using the ordinary meaning of "to commence a lawsuit," a PCRA petition is "properly filed" when it is sufficient to "commence" a PCRA proceeding. Surely, Petitioner's PCRA petition was "properly filed" in this sense – it did everything needed to "commence" a PCRA proceeding.[7] It would be strange to say PCRA proceedings never "commenced" because the appellate court eventually denied relief on time-bar grounds, years after the petition was filed and "commence[d the] lawsuit."[8]

E. Respondent and his *amici* suggest using "stay-and-abeyance" to accommodate the premature, protective

[7] As Respondent notes, *see* Resp. Br. at 18 & n.6, when Petitioner filed his PCRA petition the rule governing "commencement" of a PCRA proceeding was Pa. R. Crim. P. 1501 (West 1997) (set forth at App. 10): "A proceeding for post-conviction collateral relief shall be initiated by filing a motion and 3 copies with the clerk of the court in which the defendant was convicted and sentenced." Respondent does not dispute that Petitioner satisfied this commencement rule. *See* JA184-194; Pet. Br. at 8, 27-28; *see also Commonwealth v. Crews*, 863 A.2d 498, 501 (Pa. 2004) (stating that before December 1999 decision in *Commonwealth v. Beasley*, 741 A.2d 1258 (Pa. 1999), it was not clear that exceptions to time-bar had to be pled in PCRA petition).

[8] In *Commonwealth v. Pursell*, 749 A.2d 911 (Pa. 2000), as here, the trial court denied the PCRA claims as "previously litigated or waived" without applying a time-bar; the appellate court then affirmed on the ground that the claims were untimely, leaving "no jurisdiction to *grant Appellant relief*." *Id.* at 913-14; *cf. Artuz*, 531 U.S. at 11 ("condition to *obtaining relief*"). The Pennsylvania Supreme Court nevertheless confirmed that the petitioner "commenced" PCRA proceedings by filing his PCRA petition: "The present round of appeals *commenced* when Appellant, on June 4, 1999, filed" his PCRA petition. *Pursell*, 749 A.2d at 912.

federal habeas filings petitioners must make under Respondent's approach or else risk losing all federal review because of a state court time-bar ruling. *See* Resp. Br. at 35-37; Ala. Br. at 16-17.[9] In *Duncan v. Walker*, 533 U.S. 167 (2001), this Court warned against interpretations of "properly filed" that discourage full exhaustion in state court before filing for federal habeas relief.[10] At any rate, stay-and-abeyance would do nothing to alleviate the unfairness to Petitioner – who pursued state remedies when the Third Circuit *did not allow* stay-and-abeyance. *See* Pet. Br. at 31; *Slutzker v. Johnson*, 393 F.3d 373, 385 (3d Cir. 2004) (before the 2004 decision in *Crews v. Horn*, 360 F.3d 146 (3d Cir.), "the law of this Circuit did not yet allow [a petitioner] to stay his pending habeas corpus petition" during exhaustion).

F. Respondent says Petitioner's reading of "properly filed" provides "incentive for delay." Resp. Br. at 32. The state in *Artuz* made the same argument. *See Artuz v. Bennett*, No. 99-1238, Petitioner's Brief, 2000 WL 821138, *7-*25, *36-*37 (U.S. June 22, 2000). This Court held such

[9] Pennsylvania and state *amici* have opposed this same stay-and-abeyance procedure in other cases before this Court. *See Rhines v. Weber*, No. 03-9046, Brief of Amici Curiae States, 2004 WL 2430213 (U.S. Oct. 25, 2004); *Duncan v. Walker*, No. 00-121, Brief Amicus Curiae of Massachusetts, *et al.*, 2001 WL 22911, *25-*26 (U.S. Jan. 8, 2001).

[10] *See Duncan*, 533 U.S. at 180 ("properly filed" should be interpreted to assure that "§ 2244(d)(2) provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts"); *id.* (interpretations of "properly filed" should not create a "diminution of statutory incentives to proceed first in state court"); *id.* at 181 ("properly filed" should be interpreted in light of "AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review" and to "encourage litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions") (emphasis in original).

"policy arguments" irrelevant in light of § 2244(d)(2)'s statutory language. *Artuz*, 531 U.S. at 10.

Moreover, in non-capital cases like this one, a "prisoner's principal interest . . . is in obtaining speedy federal relief." *Rose v. Lundy*, 455 U.S. 509, 520 (1982). For the rare prisoner who is truly vexatious, the state court can always impose an actual pre-filing requirement, as this Court noted in *Artuz*, 531 U.S. at 8-9 (citing *Martin v. District of Columbia Court of Appeals*, 506 U.S. 1 (1992)). *See also* Pet. Br. at 23 & n.14.

If death-sentenced prisoners have an interest in delay, it is not served by filing untimely PCRA petitions. Pennsylvania law requires the Governor to set an execution date for within 150 days after completion of direct appeal; if that date is stayed, the Governor must set a new execution date for within 90 days after the stay is lifted. *See* 42 Pa.C.S. § 9711(i); 61 P.S. § 3002. Further, as Respondent's Brief shows, a PCRA court *cannot issue a stay* unless it finds the prisoner's claims to be *both timely and meritorious*. *See Morris*, 771 A.2d at 734-35 (cited in Resp. Br. at 26 n.12). Only a prisoner with a death wish would seek "delay" through a PCRA petition s/he knew to be untimely.

Tolling during the time it takes the state courts to decide whether claims are timely is in keeping with *Artuz* and simple fairness.

II. EQUITABLE TOLLING IS APPROPRIATE.

A. Respondent says Petitioner cannot have equitable tolling because he was not litigating in 1992-96, *before there was a limitations period* either in Pennsylvania or in the federal habeas courts. *See* Resp. Br. at 39-41. Respondent

thus attempts to penalize Petitioner for not filing when he had no duty to file, even though Respondent raised no laches or other "delay" issue in the state court when Petitioner filed in 1996, and even though the state post-conviction judge also raised no "delay" issue. Respondent also seeks to penalize Petitioner for filing in the Pennsylvania courts, rather than the federal habeas court, at a time when Third Circuit law required him to seek remedies in the Pennsylvania courts.

Petitioner filed when he had a duty to file, in the court where the law told him to file. This is not a petitioner who wanted to delay resolution of his case. To the contrary, Petitioner was sentenced to life imprisonment when he was seventeen years old; he was uneducated, barely literate and ill-prepared to deal with the law. *See*, *e.g.*, JA20, JA35, JA37, JA89, JA308, JA340-341. To be sure, it took time for him to educate himself and learn how to make meaningful *pro se* arguments. *Compare* JA147, *et seq*. (1992 *pro se* filing), with JA184, *et seq*. (1996 *pro se* filing). Along the way, his progress was hampered by lack of communication with counsel during the brief period when he was represented, *e.g.*, JA238-39; limited access to a law library, *e.g.*, JA239; and a prison riot that resulted in the destruction of his case-related papers, *e.g.*, JA320-321, JA323. Petitioner acted reasonably under the law in effect at the time of his litigation. At the least, an evidentiary hearing at which Petitioner could prove the facts establishing that he acted reasonably would be appropriate before a court could accept Respondent's invitation to penalize Petitioner.

B. Respondent does not question Petitioner's description of Pennsylvania decisional law holding that the PCRA's statutory bar rules traditionally were overcome

when a petitioner asserted that all prior counsel, including prior post-conviction counsel, were ineffective; or that denial of relief would be a "miscarriage of justice" as defined by the Pennsylvania courts; or that there was a claim challenging the legality of the sentence. *See* Pet. Br. at 6, 18-19, 36-39. Nor does Respondent dispute that Petitioner invoked these traditional bar-overcoming rules in his PCRA proceedings and argued that they should overcome the PCRA time-bar, as they had overcome other PCRA procedural bar rules. *See* Pet. Br. at 9-10, 12-15, 18-19, 37-39. Respondent asserts, however, that Petitioner somehow should have realized the PCRA "time limit was not like existing procedural bars" because it "was jurisdictional" and, thus, "the courts were without power to disturb the legislative scheme." Resp. Br. at 46; *see also id.* at 7, 12-15, 47.

When Petitioner filed his PCRA petition, he had no reason to expect that the Pennsylvania Supreme Court would eventually deem the PCRA time-bar "jurisdictional," rather than an ordinary statute of limitations. The PCRA time-bar, 42 Pa.C.S. § 9545(b), looks like an ordinary statute of limitations, not a jurisdictional rule. It does not label the time-bar "jurisdictional" or use other language associated with jurisdiction. Indeed, Respondent says the PCRA time-bar "closely tracks," "closely parallel[s]" and is "similar to" AEDPA's limitations provision, 28 U.S.C. § 2244(d), which Respondent acknowledges to be a *statute of limitations rather than a jurisdictional requirement*, *see* Resp. Br. at 7-8, 11-12, 22, 23, 24, 27, 29, 31, 32, 33, 37.

Pennsylvania's rules of statutory construction also suggest the PCRA time-bar is not jurisdictional. Pennsylvania presumes that legislative acts do not decrease a court's jurisdiction, and Pennsylvania statutes are read as

limiting jurisdiction only when there is an "unequivocal" and "clear legislative mandate," which does not exist here.[11] Moreover, construing the PCRA time-bar as jurisdictional is "particularly inappropriate in a statutory scheme," like the PCRA, where *pro se* litigants "initiate the process." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982).

Respondent says the PCRA "explicitly designates its time limit as a jurisdictional requirement." Resp. Br. at 7. That is not accurate. Section 9545 of the PCRA (set forth at App. 5) is captioned "Jurisdiction and proceedings," but only parts a and c(1) of § 9545 use jurisdictional language.[12] The time limit is in part b, which has *no "jurisdictional" language*. Neither do parts c(2)-(3) (governing stays of execution and special "limitations periods" for capital cases), or part d (governing evidentiary hearings) use jurisdictional language.[13] In this light, it is surprising

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[11] *See* 1 Pa.C.S. § 1928(b)(7) (statutory provisions "shall be strictly construed" against "decreasing the jurisdiction of a court of record"); *Commonwealth v. Barfod*, 50 A.2d 36, 39 (Pa.Super. 1946) ("Only upon the showing of a clear legislative mandate, will courts hold that subsequent legislation decreases the existing jurisdiction of a court of record."); *Jones v. W.C.A.B.*, 612 A.2d 570, 573 (Pa.Cmwlth. 1992) ("If the legislature's intent to limit jurisdiction is not clear, we should construe the act in question as imposing no limitation."), *aff'd*, 645 A.2d 209 (Pa. 1994) (per curiam); *In re Kerr*, 481 A.2d 1225, 1228 (Pa.Super. 1984) ("Absent an unequivocal expression from the Legislature that loss of jurisdiction follows from a violation of the statute, we are unwilling to so declare.").

[12] Part a ("Original jurisdiction") sets forth a jurisdictional requirement by using the word "jurisdiction" and using language typically associated with jurisdiction ("No court shall have authority"). Part c(1) suggests a jurisdictional rule by using the phrase "No court shall have the authority."

[13] It is not unusual for one section of a statute to contain both jurisdictional provisions and a statute of limitations. As Respondent

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indeed that the Pennsylvania Supreme Court ultimately said the PCRA time-bar is "jurisdictional."[14]

Even if it had been apparent that the PCRA time-bar would be labeled "jurisdictional," it was still reasonable to expect it would be trumped by Pennsylvania's court-made bar-overcoming rules, because Pennsylvania's courts ordinarily allow court-made exceptions to overcome *jurisdictional* time limits.[15] Indeed, in *Commonwealth v.*

says (*see* Resp. Br. at 28 & n.13), AEDPA's § 2244 has jurisdictional provisions in part b and a statute of limitations in part d. *See also* 28 U.S.C. § 2255 (post-conviction remedies for federal prisoner, placing original jurisdiction in district court and imposing one year statute of limitations); 42 U.S.C. § 2000e-5 (Title VII of Civil Rights Act of 1964, placing original jurisdiction in district court, part f(3), and imposing 180 day statute of limitations, part e), discussed in *Zipes*, 455 U.S. at 393-94. Similarly, the PCRA's "waiver," "previously litigated" and "laches" provisions, 42 Pa.C.S. § 9543(a)(3) & (b), which Respondent admits are non-jurisdictional, *see* Resp. Br. at 10 & n.2, 12-13, are in the same section as the "custody" requirement, § 9543(a)(1), which is jurisdictional, *see Commonwealth v. Ahlborn*, 683 A.2d 632, 637-41 (Pa.Super. 1996) (en banc), *aff'd*, 699 A.2d 718 (Pa. 1997). The pre-1996 PCRA's § 9545, also entitled "Jurisdiction and proceedings," contained jurisdictional provisions in part a and non-jurisdictional ones in part b. *See* 42 Pa.C.S. § 9545, Historical and Statutory Notes, set forth at App. 8.

[14] *See also* Pet. Br. at 42 n.30 (citing and quoting authorities); *Lambert v. Blackwell*, 134 F.3d 506, 518, 522-24 (3d Cir. 1998) (viewing PCRA time-bar as a traditional "statute of limitations," not a "jurisdictional" rule); *Peterkin v. Horn*, 30 F.Supp.2d 513, 519 (E.D. Pa. 1998) (same); *Peterson v. Brennan*, 1998 WL 470139, *5-*6 (E.D. Pa. Aug. 11, 1998) (same); *Hammock v. Vaughn*, 1998 WL 163194, *3, *5 (E.D. Pa. April 7, 1998) (same); *Morris v. Horn*, 1998 WL 150956, *2-*3 (E.D. Pa. March 19, 1998) (same); *Williams v. Vaughn*, 3 F.Supp.2d 567, 573-74 (E.D. Pa. 1998) (same); *Beasley v. Fulcomer*, 1997 WL 698178, *3 n.3 (E.D. Pa. Nov. 6, 1997) (same).

[15] *See* Pet. Br. at 42 n.30; *Cook v. U.C.B.R.*, 671 A.2d 1130, 1131-32 (Pa. 1996); *McKean County Animal Hosp. v. Burdick*, 700 A.2d 541, 543

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Peterkin, 722 A.2d 638 (Pa. 1998), when the Pennsylvania Supreme Court first called the PCRA time-bar jurisdictional, it also suggested the time-bar could be trumped by two of the bar-overcoming rules that Petitioner relied upon – "miscarriage of justice" and "illegality of sentence." *See* Pet. Br. at 40-41 (discussing *Peterkin*); *see also id.* at 38-39 & n.28 (citing Pennsylvania cases holding that "courts never relinquish their jurisdiction to correct an illegal sentence"). It was only in *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 1999), that it became clear that the Pennsylvania Supreme Court would abandon its traditional practice of providing court-made exceptions to statutory bars and treat the statutory language of the PCRA time-bar as the last word. *See* Pet. Br. at 41-42.

C. Respondent calls Petitioner's description of Third Circuit exhaustion law "bunkum," Resp. Br. at 48, but does not dispute that: (1) the Third Circuit requires exhaustion if there is any chance the state courts will address the merits, even if that is unlikely, *see* Pet. Br. at 34-35; (2) the Third Circuit first found the PCRA time-bar's statutory language controlling on the exhaustion issue in March 2000, *after* Petitioner already was in federal court, *see* Pet. Br. at 45, discussing *Lines v. Larkins*, 208 F.3d 153 (3d Cir. 2000); (3) while Petitioner was in state court, the Third Circuit and Pennsylvania's federal district courts required Pennsylvania prisoners to exhaust even when their claims appeared to be procedurally barred by the PCRA's statutory language, *see* Pet. Br. at 42-45, discussing *Doctor v. Walters*, 96 F.3d 675 (3d Cir. 1996), *Banks v. Horn*, 126 F.3d 206 (3d Cir. 1997), *Lambert v. Blackwell*, 134 F.3d 506

(Pa.Super. 1997); *Tarlo v. Univ. of Pitt.*, 443 A.2d 879, 880 (Pa.Cmwlth. 1982).

(3d Cir. 1998), and district court cases; and (4) the District Judge here expressly found that he would have dismissed a habeas petition and required Petitioner to do what he did – exhaust his claims in state court, *see* Pet. Br. at 2, 18-19, 21, 35, 47.[16]

[16] Respondent tries to question Petitioner's description of the Third Circuit's decisions in *Doctor*, *Banks* and *Lambert*. *See* Resp. Br. at 48-49. Respondent believes *Doctor* inapposite because Doctor "came to federal court a year before" the PCRA time-bar was enacted. Resp. Br. at 48-49. But *Doctor* was not about the availability of PCRA remedies in the past – it required Doctor to exhaust PCRA remedies in the future, *under the post-1996 amended PCRA*, *i.e.*, the same one involved here. *See Doctor*, 96 F.3d at 681-82; *see also Lambert*, 134 F.3d at 521 n.26 (expressly rejecting Respondent's view of *Doctor*).

Respondent believes *Banks* inapposite because it was a capital case. *See* Resp. Br. at 49. But *Banks* held that exhaustion was required "in death penalty cases (and *other cases as well*)" until "future experience" might "show that the Pennsylvania Supreme Court consistently and regularly applies" the PCRA time-bar. *Banks*, 126 F.3d at 214 n.3; *see also Lambert*, 134 F.3d at 521 & n.26 (expressly rejecting attempt to distinguish treatment of capital and non-capital Pennsylvania cases under *Banks*).

Respondent says *Lambert* "specifically contrasted Pennsylvania's non-jurisdictional procedural bars . . . with the new jurisdictional filing deadline." Resp. Br. at 49. But *Lambert* never even suggested it viewed the PCRA time-bar as "jurisdictional" – it consistently and repeatedly (ten times) called it a "statute of limitations." *Lambert*, 134 F.3d at 518, 522, 523, 524. Nor did *Lambert* "specifically contrast[ ]" the time-bar with other procedural bars – it referred to both "waiver" and the "statute of limitations" as rules of "procedural default" or "procedural bar." *Id.* at 518. And more, Respondent's current claims about *Lambert* are contrary to the position taken by Pennsylvania in this Court in *Lambert* itself. *See Lambert v. Blackwell*, No. 97-8812, Brief in Opposition to Petition for Writ of Certiorari at 7-8 (U.S. May 22, 1998), available at www.attorneygeneral.gov/press/lambert/ussupreme/wri2.htm (visited Jan. 30, 2005) ("While recent amendments to the PCRA seemed to provide that Lambert would be deemed to have *waived* review of those claims by *failing to have filed in a timely manner* for review of them, the Court of Appeals explained that there was a substantial body

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D. Respondent says equitable tolling applies only to "a litigant who was actively prevented from meeting a statutory deadline" and that there was not "any *impediment* to doing so" here. Resp. Br. at 38-39 (emphasis in original), citing *International Union of Elec., Radio & Mach. Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229 (1976). Even if we work only from Respondent's perspective, there was an "impediment" here – as the District Court found, Third Circuit exhaustion law required Petitioner to litigate the PCRA proceedings before coming to federal court.[17] And Respondent's own authority says equitable tolling of a federal statute of limitations is appropriate while a litigant pursues state court remedies that are eventually dismissed on procedural grounds. *See Robbins & Meyers*, 429 U.S. at 237-38, citing *Burnett v. N.Y. Central R. Co.*, 380 U.S. 424 (1965); *see also* Pet. Br. at 48 n.37, discussing *Burnett* and similar cases.[18]

of Pennsylvania decisional law pre-dating the PCRA amendments which recognized that a prisoner could *obtain review of waived claims where it was shown that a 'miscarriage of justice' had occurred. . . .* Since this avenue of relief had not been specifically eliminated in the new PCRA amendments, nor in any decisional law following their enactment, the Third Circuit said it could not confidently say that seeking relief in state court would be futile . . . [A]s the Court of Appeals has correctly understood . . . , the *availability of review of those claims in the Commonwealth's courts is an unsettled point of law in the wake of the PCRA amendments*. It is simply not clear that these claims are procedurally barred under Pennsylvania law.") (citing *Lambert*, 134 F.3d at 519-24).

[17] Had Petitioner filed a federal habeas petition, it would have been dismissed for lack of exhaustion, which, for statutory tolling purposes, is equivalent to never filing at all. *See Duncan v. Walker*, 533 U.S. 167 (2001).

[18] In *Burnett*, the state court dismissed for lack of venue. Numerous decisions recognize that this same tolling rule applies when the proceedings are dismissed for lack of jurisdiction, at least when the

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E. Respondent says Petitioner "wasted his time in state court" because the PCRA proceedings supposedly presented "only issues that were already exhausted, or that were non-federal." Resp. Br. at 8, 42. Actually, Petitioner's PCRA proceedings presented two new federal constitutional claims and several new factual allegations which necessitated exhaustion, *as the District Court found*. *See* Pet. Br. at 2, 8-9, 19, 21, 35, 47.

Respondent admits that Petitioner's PCRA petition raised a new federal constitutional challenge to the legality of his sentence; Respondent asserts, however, that Petitioner "abandoned the federal aspect of the claim" on appeal. Resp. Br. at 42-43. Actually, Petitioner continued to present the federal constitutional claim to the Superior Court and the Pennsylvania Supreme Court;[19] he described the claim in terms that invoked the Eighth and Fourteenth Amendments;[20] and he cited caselaw that applied

litigant had a good faith basis for believing the state court would have jurisdiction. *See* Pet. Br. at 48 n.37 (citing *Doherty v. Teamsters Pension Trust Fund*, 16 F.3d 1386, 1389, 1393-94 (3d Cir. 1994), *Husch v. Szabo Food Service Co.*, 851 F.2d 999, 1001, 1003-04 (7th Cir. 1988) and *Walck v. Discavage*, 741 F.Supp. 88, 89, 91-92 (E.D. Pa. 1990), in each of which the "wrong forum" litigation was dismissed for lack of jurisdiction); *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1174-75 (9th Cir. 1986); *Fox v. Eaton Corp.*, 615 F.2d 716, 719-20 (6th Cir. 1980); *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 614 F.2d 1051, 1053-54 (5th Cir. 1980); *Berry v. Pacific Sportfishing, Inc.*, 372 F.2d 213, 214-15 (9th Cir. 1967).

[19] *E.g.*, JA257 ("this is a challenge to the legality and constitutionality of the mandatory sentence imposed"); JA343 (same); JA257 (raising "issue of the constitutionality of a life sentence"); JA343 (same); JA321 ("the sentence was unconstitutional").

[20] *E.g.*, JA265 (sentence is "excessive, disproportionate, and arbitrary punishment" which does not "differentiate among offenders with a view to just individualization in their treatment"); JA352 (same).

Eighth and Fourteenth Amendment analysis to similar claims.[21]

Respondent admits that the PCRA petition's "challenge to the validity of [Petitioner's] plea . . . surely was a federal issue"; Respondent asserts, however, that this claim "had already been exhausted" in the prior PCHA proceedings. Resp. Br. at 43. Actually, the prior PCHA proceedings presented an *ineffective assistance of counsel* challenge to the guilty plea, *see* JA108-114, JA122-131; Pet. Br. at 4-5, while the PCRA proceedings presented a *due process* attack on the plea colloquy, *see* JA190-193, JA213-220; Pet. Br. at 8-9, which had not been presented previously.

Respondent admits that the PCRA proceedings presented new evidence; Respondent asserts, however, that the state courts could not consider the new evidence because it supported a claim that was raised in the prior PCHA proceedings. *See* Resp. Br. at 43. Actually, Pennsylvania law allowed consideration of new evidence in support of a previously raised claim, at least where, as here, the new evidence was accompanied by allegations that prior counsel were ineffective for failing to provide the evidence to the courts.[22]

[21] *E.g.*, JA257, JA343, citing *Commonwealth v. Middleton*, 467 A.2d 841, 845-46 (Pa.Super. 1983) (addressing prisoner's argument that mandatory life sentence for second-degree murder violates Eighth and Fourteenth Amendments).

[22] *See Commonwealth v. Moore*, 860 A.2d 88, 98 & n.5 (Pa. 2004) (granting relief on basis of new evidence supporting previously litigated claim where petitioner alleged prior counsel was ineffective for failing to present it); *Commonwealth v. Miller*, 746 A.2d 592, 602 n.9 (Pa. 2000) (when PCRA "claim does not rest solely upon the previously litigated evidence, we will reach the merits of appellant's claim"); *id.* at 602 n.10 (same); *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 113-14 (Pa. 1998)

(Continued on following page)

F. Respondent's *amici* assert "no harm, no foul" from Respondent's approach to tolling – they say a petitioner "whose claim has been rejected in state court as untimely would lose in federal court under the doctrine of procedural default." Ala. Br. at 17. But under Respondent's approach Petitioner loses all federal review on *all claims* – including those exhausted in the earlier PCHA proceedings and *not* subject to any procedural default – because the later PCRA claims ultimately were held untimely. Moreover, under the procedural default doctrine, federal relief would be warranted even on the "untimely" claims if Petitioner can show the state court ruling was not based on an adequate and independent state ground, or "cause and prejudice," or "miscarriage of justice." *See* Pet. Br. at 30-31. There are no such safety valves for the time-bar dismissal that Respondent seeks.

G. Respondent says Petitioner should not receive equitable tolling for pursuing the exhaustion that Third Circuit law required because exhaustion "exists to protect the interests of the state, not the petitioner." Resp. Br. at 50. But the exhaustion requirement is not meant to "trap the unwary *pro se* prisoner," *Rose*, 455 U.S. at 520; *Slack v. McDaniel*, 529 U.S. 473, 487 (2000), or "shatter the attempt at litigation of constitutional claims," *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490 (1973). Instead, exhaustion is a rule of comity "designed to protect the state courts' role in the enforcement of federal law" by "giving those courts the first opportunity to review all claims of constitutional error." *Rose*, 455 U.S. at 518-19; *see also Duncan*, 533 U.S. at 178-79. And this is exactly

(revisiting claim decided on direct appeal where petitioner proffered new evidence to support that claim).

why Third Circuit exhaustion law required Petitioner to do what he did – since it seemed the Pennsylvania courts might be willing to address his claims, comity required that they be given the first opportunity to do so. Under these circumstances, it would be "perverse" to allow the exhaustion requirement to "bar [Petitioner] from ever obtaining federal habeas review." *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998).

CONCLUSION

This Court should hold that statutory and equitable tolling are appropriate.

Respectfully submitted,

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In the
Supreme Court of the United States

JOHN A. PACE,
Petitioner,

v.

DAVID DiGUGLIELMO, Superintendent,
State Correctional Institution at Graterford,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF OF THE STATE OF ALABAMA FOR 26 STATES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

When a state court applies its statute of limitation to preclude consideration of a state post-conviction petition, should this Court find, in accordance with the plain language of 28 U.S.C. § 2244(d)(2), its earlier decisions in *Artuz v. Bennett* and *Carey v. Saffold*, and principles of federalism, that the petition was not "properly filed" and thus did not toll the one-year statute of limitation applicable to federal habeas corpus petitions?

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INTEREST OF AMICI CURIAE

Pursuant to Sup. Ct. R. 37.4, the amici curiae States of Alabama, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Kansas, Illinois, Indiana, Iowa, Maine, Maryland, Michigan, Missouri, Montana, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington, and Wyoming respectfully submit this brief in support of respondent David DiGuglielmo. The Third Circuit held that petitioner John Pace's second state post-conviction petition, which was filed outside Pennsylvania's one-year statute of limitation, was not "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2) – and, accordingly, did not statutorily toll the one-year limitation period applicable to his federal habeas petition under 28 U.S.C. § 2244(d)(1). Based on the ordinary meaning of § 2244(d)(2)'s language, as well as this Court's decisions in *Artuz v. Bennett*, 531 U.S. 4 (2000), and *Carey v. Saffold*, 536 U.S. 214 (2002), the amici states respectfully submit that the Third Circuit was correct.

The amici states are keenly interested in the continued recognition and enforcement of their duly enacted procedural rules. Statutes of limitation serve the important purpose of winnowing out claims that warrant consideration from those that will waste judicial resources. *See, e.g., Carey*, 536 U.S. at 226 (purpose to prevent "stale claims"). A reversal here would only permit, and perhaps even encourage, state prisoners to file repetitive, frivolous, and abusive state collateral petitions, all the while tolling the period for later filing a federal habeas petition.

STATEMENT OF THE CASE

1. Nearly 20 years ago, in the course of robbing a random pedestrian of a brown-bag lunch, petitioner John Pace beat the victim to death with a blackjack. On February 13, 1986, Pace allocuted to second degree murder in the Pennsylvania Court of Common Pleas and received a mandatory life sentence. He did not challenge his conviction on direct appeal.

2. Approximately five months after his conviction became final, on August 21, 1986, Pace filed a state post-conviction petition under the Pennsylvania Post Conviction Hearing Act ("PCHA"), 42 Pa. Cons. Stat. § 9541 *et seq*. In the petition, Pace contended that his trial counsel had acted ineffectively and that his guilty plea had been unlawfully induced. Counsel was appointed on two different occasions; each time, Pace filed an amendment to his petition and was granted a hearing. At the second hearing, Pace testified that he had not understood the implications of receiving a sentence of life imprisonment. On July 23, 1991, the Pennsylvania Court of Common Pleas dismissed Pace's petition.

The Pennsylvania Superior Court affirmed the denial of post-conviction relief in an unpublished decision filed March 30, 1992. The decision became final 30 days later when Pace declined to seek discretionary review in the Pennsylvania Supreme Court.

3. On November 17, 1995, the Pennsylvania Legislature amended 42 Pa. Cons. Stat. § 9541 *et seq*. (then titled the Post Conviction Relief Act, or "PCRA") to establish a one-year statute of limitation. The new provision, 42 Pa. Cons. Stat. § 9545, included three statutory exceptions to the time-bar. More specifically,

the amended § 9545 required a post-conviction petition to be filed within a year of the conviction becoming final unless either (i) governmental inference thwarted the petitioner's ability to assert the claim earlier, (ii) the petitioner predicated his claim on newly-discovered facts, or (iii) the petitioner asserted a newly-recognized, retroactively-applicable federal or state constitutional right. To invoke one of the three enumerated exceptions, the amended § 9545 required the petitioner specifically to allege the exception in his petition. In addition, § 9545 required that "[a]ny petition invoking an exception ... shall be filed within 60 days of the date the claim could have been presented." *Id*. § 9545(b)(2). Finally, § 9545 included a savings clause: "[T]he amendment of ... [these provisions] shall apply to petitions filed after the effective date of this act; however, a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition ... if the petitioner's first petition is filed within one year of the effective date of this act." *Id*. § 9545 note.

4. On November 27, 1996, Pace filed a second state post-conviction petition asserting – with one exception – the same claims that he had exhausted in his 1986 PCHA petition. Pace did not allege, as required by statute, that any of the enumerated exceptions to the PCRA's one-year limitation period applied to his petition.

Counsel was appointed and, in accordance with Pennsylvania procedure, filed a letter explaining that Pace's claims had no merit and a motion to withdraw from the case. The Commonwealth did not respond to Pace's petition. On July 23, 1997, the Pennsylvania Court of Common Pleas granted Pace's attorney's motion to withdraw and dismissed Pace's petition. Six

days later, on July 29, 1997, the court issued an opinion explaining that it had denied Pace's petition because the claims were precluded and meritless.

On appeal, the Commonwealth appeared and argued that, in any event, Pace's petition was untimely under the PCRA. The Pennsylvania Superior Court agreed and, in an opinion filed December 3, 1998, determined that Pace's petition was time-barred under § 9545's one-year statute of limitation. The court found that the statute of limitation was jurisdictional and, because Pace had not alleged (or a review otherwise revealed) that any of the three enumerated PCRA exceptions applied, held his petition precluded from review.

After the Pennsylvania Superior Court denied Pace's request for reargument, the Pennsylvania Supreme Court denied review on July 29, 1999.

5. In the meantime, Congress enacted and President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). AEDPA imposed a one-year limitation period on federal habeas corpus applications. 28 U.S.C. § 2244(d)(1). The period commences on one of several dates, including the date on which the petitioner's state-court judgment becomes final. Particularly relevant here, tolling of the one-year period is available during the time in which any "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." *Id.* § 2244(d)(2).

6. Pace filed a federal habeas corpus petition in the United States District Court for the Eastern District of Pennsylvania on December 23, 1999. The magistrate judge recommended dismissal of Pace's

petition as untimely under AEDPA's one-year statute. Importantly for present purposes, the magistrate concluded that Pace's second state post-conviction petition had not tolled the limitation period; because the Pennsylvania courts had found the petition to be time-barred, it had not, the magistrate found, been "properly filed" under state law within the meaning of § 2244(d)(2).

The district court disagreed. It ruled that Pace was entitled under AEDPA to both statutory and equitable tolling; as a result, the court held that Pace had, in fact, timely filed his federal habeas corpus petition. The court refused to follow the Third Circuit's decision in *Fahy v. Horn*, 240 F.3d 239 (3rd Cir. 2001), which had rejected statutory tolling for untimely state collateral petitions.

While the case was pending in the district court, the Third Circuit, in *Merritt v. Blaine*, 326 F.3d 157 (3rd Cir. 2003), had reaffirmed its view that an untimely state post-conviction petition does not trigger statutory tolling under AEDPA and, further, clarified that an alleged mistake of law does not justify equitable tolling in a non-capital case.

In accordance with its earlier decisions in *Fahy* and *Merritt*, the Third Circuit reversed in Pace's case. It held that because Pace's second state post-conviction petition had been untimely filed under state law, it had not been "properly filed" within the meaning of § 2244(d)(2) and, thus, did not statutorily toll the one-year federal statute of limitation. *Pace v. Vaughn*, No. 02-3049, 2003 WL 21754982, at *1 (3rd Cir. July 30, 2003). The court further concluded that Pace was not entitled to equitable tolling of the statutory period – first, because he did not prove that "the lack of certainty as to how Pennsylvania courts would

interpret the PCRA" was "an 'extraordinary' circumstance," and second, because he did not promptly pursue post-conviction relief once "'Pennsylvania law as to the time bar of the PCRA became clear." *Id.* at *2.

ARGUMENT

I. The Ordinary Meaning Of § 2244(d)(2)'s Terms And This Court's Decisions In *Artuz v. Bennett* And *Carey v. Saffold* Demonstrate That An Untimely State Post-Conviction Petition Is Not "Properly Filed."

In this case, the Court must squarely address the question left unanswered in *Artuz v. Bennett*, 531 U.S. 4, 8 n.2 (2000): Whether a state post-conviction petition that the state courts have rejected as untimely under state law is nonetheless "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2), so as to toll the one-year statute of limitation contained in 28 U.S.C. § 2244(d)(1). To say that the question is unanswered, however, is not to say that this Court's decisions do not suggest a resolution. In fact, as we will show, they do so rather clearly.

1. But let's start with § 2244(d)(2)'s text. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) ("The starting point for [the] interpretation of a statute is always its language."). More specifically, let's start, in accordance this Court's recent decisions, with the question of how "ordinary people in common usage" would understand what it means for a document to be "properly filed" – not just filed, but *properly* filed. *General Dynamics Land Systems, Inc. v. Cline*, 124 S. Ct. 1236, 1243 (2004); *accord Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001) ("ordinary English"). It seems to

us inconceivable that the ordinary speaker, listener, writer, or reader of American English would think that a *late* pleading – or objection, motion, notice, brief, etc. – was filed "properly." Does the groom act "properly" when he shows up an hour late to his own wedding? Is it "proper[]" for a business traveler to arrive at the airport at 7:00 to catch a 5:30 flight? Can a prospective employee waltz into an interview even 10 minutes late and expect to impress? We live – necessarily – in a world chock full of deadlines. In that world – the real world – lateness is perhaps no mortal sin, but it is by no means "proper[]," either.

2. This Court's decisions confirm the commonsense conclusion that a late petition is not a "properly filed" petition. For starters, *Artuz* itself focused on everyday "common usage" in approaching the term "properly filed." 531 U.S. at 9. And against that measure, the Court indicated that, at least as a presumptive matter, a time-barred state post-conviction petition would *not* be deemed "properly filed" for § 2244(d)(2) tolling purposes. Specifically, the Court defined the term "properly filed" to require "delivery and acceptance ... [of] an application ... in compliance with the applicable laws and rules governing filings." *Id.* at 8-9. And in turn, the Court explained that the "laws and rules governing filings" – *i.e.*, the conditions to "proper[] fil[ing]" under § 2244(d)(2) – include conformity with "the time limits on [an application's] delivery." *Id.* That conclusion follows straightaway from AEDPA's plain language and is eminently sensible. Now, to be sure, the Court reserved judgment on the specific question whether exceptions to a state statute of limitation might "*prevent* a late application from being *improperly* filed" *id.* at 8 n.2; the point here is simply that the Court's opinion makes clear that, at least as a

presumptive matter, a late post-conviction petition is *not* a "properly filed" post-conviction petition.[1]

Carey v. Saffold, 536 U.S. 214 (2002), points to the same conclusion – that a *late*-filed state petition is not "properly filed" for § 2244(d)(2) purposes. Indeed, as explained below, four members of the Court offered not just a suggestion, but a definitive answer to the question presented here. The issue in *Saffold*, of course, was whether a state post-conviction petition is "pending" for § 2244(d)(2) purposes during the intervals between stages of state-court review – say, between the decision of an intermediate appellate court and the state's highest court.[2] This Court answered that question in the affirmative, but with an important caveat: In order to qualify as "pending," the appeal (or in California's unique system, the renewed petition) must be filed in a timely manner. The California Supreme Court's treatment of Saffold's post-conviction petition gave rise to an ambiguity; that court had denied Saffold's petition – which had been filed 4½ months after the intermediate court's ruling – "on the

[1] Indeed, the view that a post-conviction petition must be timely filed in order to be deemed "properly filed" was (at least arguably) not even disputed in *Artuz*. The inmate-respondent there observed in his brief (and again at oral argument) that "[w]hen the task to be accomplished is the filing of a document, that task is completed 'properly' when the established requirements for filing – delivery of the correct document to the designated authority *at the right time* – have been met." Br. for Resp. 17 (emphasis added) (citations omitted); *see also* Tr. of Oral Arg. at 29 (A: "[Prisoners] must file the right document with the right custodian in the right time ... ." Q: "And also, a timely filing?" A: "That's correct.").

[2] Pace's argument that *Saffold* is categorically irrelevant here because it addresses the term "pending" rather than "properly filed" is, with respect, myopic. Pet. Br. 32. It is *Saffold*'s *reasoning*, not its specific holding, that suggests this case's proper resolution.

merits and for lack of diligence." 536 U.S. at 225. That statement led to the question whether the state supreme court had, in fact, found Saffold's renewed petition untimely – in which case, this Court said, "his application would no longer have been 'pending' during th[e] period" of lateness. *Id.* Given the vagueness of the state supreme court's order, that question was simply unanswerable on the record this Court had before it (hence, the remand to the Ninth Circuit).

Notably for present purposes, however, this Court emphasized that it would have deferred (and, presumably, would defer in the future) to a state court's unambiguous decision concerning timeliness: "If the California Supreme Court had clearly ruled that Saffold's 4½-month delay was 'unreasonable'" – untimely, California post-conviction lingo – "that would be the end of the matter, regardless whether it also addressed the merits of the claim, or whether its timeliness ruling was 'entangled' with the merits." *Id.* at 226. What *Saffold* suggests for the present case, therefore, is that when a state court definitively concludes – as did the Pennsylvania courts here – that an inmate's post-conviction petition is untimely, "that [is] the end of the matter," *id.*, and that a federal court sitting in habeas should defer to that determination.

As mentioned, four members of the *Saffold* Court left less to the imagination. In an effort to avoid precisely the rule that this Court adopted – that with respect to a filing's timeliness, what a state court says, goes – Saffold had argued that, perhaps, the California Supreme Court's "lack of diligence" finding related *not* to his 4½-month delay in seeking relief from the state high court, but, instead, to his five-year delay in pursuing any state post-conviction relief in the first place. The Court, for its part, noted that Saffold's

initial five-year delay was "irrelevant to the question whether his application was 'pending' during" later intervals between review stages. *Id.* at 226. Writing in dissent for himself, as well as for the Chief Justice and Justices Scalia and Thomas, Justice Kennedy responded that, in any event, "[t]his ambiguity ... should not benefit" Saffold. *Id.* at 236 (Kennedy, J., dissenting). In explaining why not, the *Saffold* dissenters clearly telegraphed the answer to the question presented in this case: If, they said, the California court had "held that all of [Saffold's] state habeas petitions were years overdue, *then they were not 'properly filed' at all, and there would be no tolling of the federal limitations period.*" *Id.* (emphasis added).[3] In other words, when a state court concludes – as have the Pennsylvania courts here – that a state prisoner's post-conviction petition was "overdue," a federal court sitting in habeas must likewise conclude that the petition was not "properly filed" in the first place, and must refuse federal tolling.

3. To round matters out, it is important to note that AEDPA's purpose and policy also support the view that an untimely state post-conviction petition is not "properly filed." AEDPA was adopted with the intention to "further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Like the rules of exhaustion, *see* 28 U.S.C. § 2254(c), and procedural default, *see Coleman v. Thompson*, 501 U.S. 722, 731 (1991), § 2244(d)(2)'s one-year statute of limitation promotes the finality of state

[3] Notably, for support, Justice Kennedy cited the very page in *Artuz* where this Court had concluded, at least presumptively, that a "properly filed" application must comply with "the time limits on ... delivery." 536 U.S. at 236 (citing *Artuz*, 531 U.S. at 8).

court judgments. The values of comity, finality, and federalism would undoubtedly be undermined if a federal court could turn a blind eye to a state court's ruling concerning timeliness and use a late-filed post-conviction petition as the basis for tolling the federal limitation period. In petitioner's world, state prisoners could prolong tolling indefinitely while they churned new claims in state court or, for that matter, simply waited around for some fortuitous occurrence. But (it goes without saying) Congress included a limitation period was included in AEDPA to *restrict* the time in which inmates could pursue habeas review. AEDPA's purpose is effectuated by tolling the federal period of limitation only for the periods of time during which the state petitioner could have legitimately pursued state post-conviction relief. AEDPA's purpose is gutted by Pace's proposed resolution.

II. None Of Pace's Arguments For Recognizing An Untimely State Post-Conviction Petition As "Properly Filed" Withstands Scrutiny.

Pace offers several reasons for concluding that a late post-conviction petition should nonetheless be deemed "properly filed." None is persuasive.

1. Pace first seems to suggest that, because decisions about timeliness may require some thought – and judicial involvement – timeliness cannot be a true "condition to filing" within the meaning of *Artuz*. Pet. Br. 23-29. But *Artuz* itself defeats that argument. Whatever else *Artuz* may say or suggest about the meaning of the term "properly filed," it makes plain that at least two requirements are indeed "condition[s] to filing" – the failure of which precludes a state application from being "properly filed" within the meaning of § 2244(d)(2). Those conditions are (i)

jurisdiction and (ii) the payment of the required filing fee. *See* 531 U.S. at 9 ("If, for example, an application is erroneously accepted by the clerk of a court lacking jurisdiction, or is erroneously accepted without the requisite filing fee, it will be *pending*, but not *properly filed*.").

On this score, there are two things worth noting. As an initial matter, as respondent's brief explains in detail, in many states – including Pennsylvania – timeliness is *expressly* a "jurisdiction[al]" requirement and thus, under *Artuz*, a true "condition to filing." Resp. Br. 12. As if to drive that point home, the Pennsylvania Legislature placed the post-conviction statute of limitation *not* in the "Eligibility for Relief" section alongside the laches and successive-petition provisions, *see* 42 Pa. Cons. Stat. § 9543, but, instead, in a separate section titled "Jurisdiction and Proceedings," *id.* § 9545. Alabama utilized restrictive language to achieve precisely the same result. The sections of Alabama's post-conviction-petition rule governing procedurally barred, successive, and ineffective assistance of counsel claims merely preclude courts from granting "relief." Ala. R. Crim. P. 32.2(a), (b), (d). The section establishing a one-year statute of limitation, by contrast, states more broadly that a court "shall not *entertain*" a late-filed petition. Ala. R. Crim. P. 32.2(c) (emphasis added).[4] Common sense dictates

[4] *See also, e.g.*, Tenn. Code Ann. § 40-30-102(a) (1995) ("No court shall have *jurisdiction* to consider a petition" filed after the one-year statute of limitation); *Williams v. State*, 783 So. 2d 135, 137 (Ala. Crim. App. 2000) ("the failure to file a Rule 32 petition within the two-year limitations period is a jurisdictional defect"); *Petree v. State*, 920 S.W.2d 819, 820 (Ark. 1995) (stating that, when the filing deadline under Rule 37.2(c) of the Arkansas Rules of Criminal Procedure is "not met, a circuit court lacks jurisdiction to consider the ... petition"); *Mitchell v. State*, 14 S.W.3d 672, 673 (Mo. Ct. App. 2000) (defining the timeliness requirement of Mo. R. Crim. P. 24.035 as "jurisdictional"); *Sanchez v. State*, 86 P.3d 1, 2 (Mont. 2004) (explaining that the "time limitation" contained in Mont. Code Ann. § 46-21-102(1) "is a jurisdictional limit on litigation"); *Commonwealth v. Gamboa-Taylor*, 753 A.2d 780, 783-84 (Penn. 2000) ("the time limitations of the 1995 amendments are jurisdictional").

that a state post-conviction petition cannot be "properly filed" when the state itself disclaims any authority even to consider it.

Second, on a more general level, rarely, if ever, will jurisdiction (in the traditional sense) or the sufficiency of a filing fee be obvious on a review of the face of a pleading. As to jurisdiction, a trial judge is asked – indeed, required – to apply his knowledge of the law to determine whether the issues raised do, in fact, implicate or affect the convicting court's ability to bring the petitioner into court, try him on the charges listed in the indictment, and impose a sentence. A trial court clerk would not be expected to – and, as a practical matter, is not required to – possess adequate knowledge of the law to determine, for instance, whether an indictment alleged all of the essential elements of the charged offense, whether a crime is a lesser-included offense of the charge contained in the indictment, or whether the sentence imposed was illegal.

The same is true of filing fees. Indeed, both Pennsylvania's and Alabama's post-conviction statutes state that, although payment of a filing fee is required as a general matter, it may be waived if a petitioner can convince a *judge* – not a court clerk – that he is entitled to proceed in forma pauperis. *See* Pa. R. Crim. P. 1504(e); Ala. R. Crim. P. 32.6(a). As this Court

knows, the question whether a particular litigant's circumstances justify IFP status (and a corresponding waiver of the filing fee) is not a matter of mere formality. Oftentimes, the determination of poverty presents a close question and requires an exercise of judgment. In any event, the point is that, by singling out jurisdiction and filing fees as examples, this Court has already implicitly rejected Pace's contention that, in order to qualify as a "condition to filing" – and thus a "proper[] fil[ing]" requirement under § 2244(d)(2) – the condition must be one capable of rote or reflexive application.

2. Relatedly, Pace repeatedly suggests that the only real "condition to filing" is the lodging of the petition in the correct court. Pet. Br. 20, 25, 27-29. Pace's argument is misguided and is indicative of a larger defect in his interpretation of the term "properly filed." In Pace's view, the only "condition to filing" is one that, if not satisfied, will cause a court (or even a court clerk) to turn away a petition at the courthouse door. (For a colorful analogy, see respondent's discussion of "hot potato." Resp. Br. 16.) But on that understanding, not even Pace's chosen example – filing in the right court – is a true "condition to filing." Again, Pennsylvania's and Alabama's procedural rules coincide. Both expressly require filing in a particular court – specifically, the court of conviction. *See* Pa. R. Crim. P. 1501(2); Ala. R. Crim. P. 32.5. But – and this a where Pace's theory of filing requirements begins to unravel – both also *expressly* provide that if a petition is filed in the wrong court, it will *not* be struck for non-compliance or even returned for refiling; rather, it will simply be transferred to the proper venue. *See* 42 Pa. Cons. Stat. § 5103; Ala. R. Crim. P. 32.5. Accordingly, just the tiniest little bit of digging reveals that, on Pace's view, the category of "condition[s] to filing" that

this Court established in *Artuz* is actually an empty set. There are, from his perspective, simply no such conditions. That, to be sure, is the rule most accommodating of litigious state prisoners, but it is just as surely not the interpretation Congress intended when it enacted the AEDPA for the very purpose of streamlining the post-conviction process.

In the real world, there is nothing that would lead one to conclude that timeliness is any less (let alone categorically less) a "condition to filing" than other traditional threshold considerations. Alabama's filing requirements are illustrative. Alabama Rule of Criminal Procedure 32, which governs all post-conviction proceedings, entails requirements that the inmate's petition be filed (i) within a specified time, Ala. R. Crim. P. 32.2(c); (ii) in a particular court, Ala. R. Crim. P. 32.5; (iii) in a defined form, Ala. R. Crim. P. 32.6(a); (iv) accompanied by a designated number of copies, Ala. R. Crim. P. 32.6(a); (v) along with a filing fee, Ala. R. Crim. P. 32.6(a); and (vi) containing a full and clear statement of the grounds for relief, Ala. R. Crim. P. 32.6(b). None of these requirements, either facially or practically, is any less a "condition to filing" than another. All use mandatory language (*e.g.*, "shall be filed"), and all are prerequisites to judicial consideration. Indeed, to the extent that these various requirements admit of any distinction, that distinction suggests that time limits perhaps *particularly* qualify as "condition[s] to filing." As noted above (*see supra* at 12), unlike other provisions of Rule 32 that merely preclude "relief" – for procedurally barred, successive, and ineffective-assistance-based petitions, *see* Ala. R. Crim. P. 32.2(a), (b), (d) – Rule 32's timeliness provision prohibits a court from even "entertain[ing]" a late petition, Ala. R. Crim. P. 32.2(c).

3. Pace also argues (Pet. Br. 26-29) that, by its nature, a statute of limitation applies on a claim-by-claim basis and, accordingly, cannot be a "proper[] fil[ing]" requirement, which this Court said in *Artuz* must apply to an entire "application." 531 U.S. at 10. Pace is wrong on two counts. First, AEDPA's own statute of limitation rebuts his descriptive claim. Section 2244(d)(1) provides that "[a] 1-year period of limitation shall apply to an *application* for a writ of habeas corpus ... ." Plainly, Congress did not view as incongruous the notion that a statute of limitation could be understood as applying to an "application" for collateral relief.

Second, to the extent that the claim-application dichotomy could be understood to create any problem, it admits of a simple solution: If a post-conviction petition contains *any* claim that is not time-barred, the petition itself – *i.e.*, the "application" – is "properly filed" for § 2244 purposes. If, on the other hand, all claims within the petition are time-barred, the petition itself is untimely and thus "[im]properly filed." Indeed, that is precisely the analysis that § 2244(d)(2)'s language seems to require. Throughout his brief, Pace focuses exclusively on the requirement of a "properly filed application." But what § 2244(d)(2) actually requires is a "properly filed application ... with respect to the pertinent judgment *or claim*." As respondent says in his brief, "under the statute, all it takes is one" timely claim to render the "application" "properly filed" within the meaning of § 2244(d)(2). Resp. Br. 24. On this sensible reading, in whatever posture a petition is presented, the reviewing federal court will be able to apply the "properly filed" standard with certainty.

4. Finally, Pace raises the specter of "protective petitions." Pet. Br. 30-32. If, he warns, a state court

lingers too long in deciding a timeliness issue, a petitioner may be compelled to go ahead and file in federal court to avoid missing his one-year federal window. There are several responses. First, *Artuz* confronted the question of protective filings – and promptly tabled it. Such policy concerns, the Court held, are for Congress, not the judiciary; the Court's duty consists in ascertaining the best "interpretation of the text." *Id*; *see also Duncan v. Walker*, 533 U.S. 167, 181 (2001) (rejecting "unfairness" argument and emphasizing that the Court's "sole task ... is statutory construction"). Second, there is a certain "no harm, no foul" principle at work here. Even if he were not bounced under § 2244(d)(1)'s statute of limitation, a habeas petitioner whose claim had been rejected in state court as untimely would lose in federal court under the doctrine of procedural default. *See Harris v. Reed*, 489 U.S. 255, 263 (1989); *Coleman v. Thompson*, 501 U.S. at 729.

Third, and in any event, Pace overstates the threat of protective filings. Protective filings are not a new phenomenon. In some form or another, protective filings occur on a fairly regular basis in (at least some) federal courts. (The propriety of the so-called "stay and abeyance" procedure – a form of protective filing – is presently before this Court in *Rhines v. Weber*, No. 03-9046.) While by no means an ideal resolution – for either the federal courts or the States responding to prisoners' filings – protective filings are, so to speak, the devil we know. The devil we don't know – and, amici submit, don't want to know – is Pace's freewheeling construction of § 2244(d)(2), pursuant to which an inmate could file repetitive and untimely state petitions and, by the sheer act of doing so, indefinitely toll his federal limitation period.

CONCLUSION

For the foregoing reasons, the amici States submit that the decision below should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

JOHN A. PACE,

Petitioner,

v.

DAVID DiGUGLIELMO,
Superintendent, State Correctional
Institution at Graterford, et al.,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The National Association of Criminal Defense Lawyers and its affiliate the Pennsylvania Association of Criminal Defense Lawyers file this *amicus curiae* brief pursuant to this Court's Rule 37.3(a) in support of Petitioner John A. Pace. [1]

INTEREST OF THE *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non–profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 States. NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the preservation of access to federal habeas corpus and the interpretation of

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[1] The parties' letters of consent to the filing of this brief accompany the brief. Under Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicui curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of this brief.

the Antiterrorism and Effective Death Penalty Act (AEDPA).

The Pennsylvania Association of Criminal Defense Lawyers (PACDL) is a Pennsylvania nonprofit corporation established in 1988, whose membership comprises over 600 public and private criminal defense attorneys from throughout the Commonwealth. An affiliate of NACDL, the Association attempts, as stated in its by-laws, "to foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases"; "to achieve justice and dignity for defense lawyers, defendants and the criminal justice system itself"; "to protect and insure by rule of law, those individual rights guaranteed by the Pennsylvania and United States Constitutions"; and "to promote the proper administration of criminal justice." PACDL is the only statewide organization working strictly on behalf of the professional interests of Pennsylvania's public and private criminal defense lawyers, including the rights of their clients. The members of PACDL are united in their support of keeping the cherished privilege of access to habeas corpus open as a safeguard for the protection of the federal constitutional rights of our clients. In particular, PACDL is concerned to ensure that the undue restrictions on the availability of state post–conviction relief in Pennsylvania are not incorporated into federal habeas corpus jurisprudence without a clear warrant in Congressional language. This *amicus* brief arises out of our members' dedication to the preservation of our system of justice.

SUMMARY OF ARGUMENT

Before engaging in construction of the statutory tolling provision of 28 U.S.C. § 2244(d)(2) (2003), the Court should examine the assumption underlying its decisions in *Carey v. Saffold*, 536 U.S. 214 (2002), and

Duncan v. Walker, 533 U.S. 167 (2001), that this provision applies to petitioners whose convictions became final more than a year prior to AEDPA's effective date. Under a longstanding line of authority from this Court, it does not. Under the plain language of the AEDPA, petitioner's statute of limitations had run out before the new law was even passed. Although the circuits have all "created" a "grace period" of one year from April 24, 1996, to cover such cases, there is no basis in the statutory language and no general authority under Article III of the Constitution to "create" such a provision through judicial legislation. Rather, for lack of any properly legislated grace period, AEDPA's statute of limitations must be held unconstitutional or at least to be not retroactively applicable to prisoners such as petitioner. Applying pre-AEDPA law to the timeliness of his petition, there is no problem in the filing. In any event, even if a "grace period" applies, statutory tolling of that period is neither necessary nor appropriate. Because under all the circumstances petitioner filed his federal habeas petition within a reasonable time after April 1996, its filing was not outside any applicable statute of limitations.

To the extent that statutory tolling does apply, the court below erred in deferring to the state court in determining that petitioner's state post–conviction petition had not been "properly filed" under § 2244(d)(2). The state court held that petitioner failed to satisfy a new state statute of limitations for post-conviction filings. Because that provision lacked any "grace period" for second or subsequent filers whose convictions had become final years earlier, the state law to which the court below deferred was itself unconstitutional under this Court's cases. Whatever deference is due under § 2244(d)(2) to state court rulings on the timeliness of filings, none can be given to a ruling, which violates the Constitution.

Finally, petitioner was at least entitled to equitable tolling of any applicable statute of limitations. The equitable tolling doctrine is consistent with AEDPA, and should be applied with flexibility, taking into account the realities of the circumstances under which state prisoners, most of them indigent, uneducated and uncounseled, strive to protect their right to federal review of unconstitutional convictions and sentences.

ARGUMENT FOR AMICI CURIAE

I. FOR LACK OF ANY LEGISLATIVELY DETERMINED "GRACE PERIOD," THE AEDPA STATUTE OF LIMITATIONS CANNOT CONSTITUTIONALLY BE APPLIED TO OLDER CASES SUCH AS PETITIONER'S.

This case is not governed by the tolling provisions of 28 U.S.C. § 2244(d)(2) (2003). Petitioner's entitlement to federal habeas corpus review does not, therefore, depend on whether his state application for post-conviction relief was "properly filed" within the meaning of those provisions. Before assuming otherwise, this Court should first consider whether federal judges can create a non-statutory "grace period" exception to the AEDPA statute of limitations. The circuits, including the court below, have uniformly interpreted or applied the statute in this way, but none has explained how Article III permits it. The same unexplained assumption underlies the decision in *Carey v. Saffold*, 536 U.S. 214 (2002). This assumption does not withstand scrutiny. Since federal courts in fact do not have power to "create" a "grace period," the AEDPA statute of limitations is unconstitutional as applied to convictions which became final before April 24, 1996.

Moreover, even if the "grace period" were a valid *judicial* construct, it would not be subject to the limitations of *statutory* "tolling."

A. The federal courts lack competence to "create" a "grace period" exception to a statute of limitations which plainly lacks one.

In both *Carey*, 536 U.S. 214, and *Duncan v. Walker*, 533 U.S. 167 (2001), this Court appears to have merely assumed that a one-year "grace period" is part and parcel of the *statute* of limitations. *See also Artuz v. Bennett*, 531 U.S. 4 (2000). Indeed, in *Saffold*, the Court asserted, without explanation or analysis of statutory language, that the respondent, a prisoner whose conviction became final in 1992, faced a one-year period of limitation which "began running on AEDPA's effective date, April 24, 1996." 536 U.S. at 217. The basis for this assumption may have been, as the concurring opinion in *Walker* noted, that "[i]n the context of AEDPA's 1-year limitations period, ... the Courts of Appeals have uniformly created a 1-year grace period, running from the date of AEDPA's enactment, for prisoners whose state convictions became final prior to AEDPA." 533 U.S. at 183 (Stevens & Souter, JJ.). [2]

The impetus for judicial creation of a grace period lies in a venerable constitutional rule. "The Constitution ... requires that statutes of limitations must '"allow a reasonable time after they take effect for the commencement of suits upon existing causes of action."'" *Block v. N.D. ex rel. Bd. of Univ. and Sch. Lands*, 461

[2] The concurring opinion cites such cases from every circuit which encompasses one or more states. *Duncan*, 533 U.S. at 183 n.1.

U.S. 273, 286 n.23 (1983) (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 527 n.21 (1982), in turn quoting *Wilson v. Iseminger*, 185 U.S. 55, 62-63 (1902)). The notion that a *court* can create a "grace period" to satisfy this constitutional requirement is of dubious validity at best. This is not an instance in which Congress failed to specify any statute of limitations, and the courts must therefore discern and apply the period which is most appropriate. *E.g., N. Star Steel Co. v. Thomas*, 515 U.S. 29, 33-34 (1995) (listing many such cases). Unlike civil actions in the nature of tort or contract, after all, habeas corpus proceedings are subject to no limitations period at all but for statutory innovation. Nor does the AEDPA provision call upon the Court to decide whether and how to apply a common law rule to find the date on which a limitations period accrued, where Congress has specified the limitations period but not the accrual date. *See, e.g., Franconia Assocs. v. United States*, 536 U.S. 129, 141-42 (2002); *Rotella v. Wood*, 528 U.S. 549 (2000); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997); *United States v. Kubrick*, 444 U.S. 111 (1979); *Amy v. City of Watertown*, 130 U.S. 320 (1889) (discovery rule). Instead, Congress specified in AEDPA the period (one year) and also expressly described the four possible dates of accrual, or, one might say, the primary date of accrual and three special exceptions.

Section 2244(d)(1) of Title 28, as added by AEDPA, provides that a "1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Ordinarily, that period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review ...." *Id.* § 2244(d)(1)(A). Alternatively:

> • "if the applicant was prevented from filing" by "State action in violation of the Constitution or laws of the United States," *id.* (d)(1)(B), or
>
> • if the petition is based on a "constitutional right" which "has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," *id.* (d)(1)(C), or
>
> • if "the factual predicate of the claim or claims presented could" not "have been discovered" earlier "through the exercise of due diligence," *id.* (d)(1)(D),

then a different date will trigger the one-year limitations period. The Act explicitly states, in mandatory terms, that the limitations period "shall run from the latest of" these four dates. The latest of those dates, in petitioner Pace's case, was in 1986, when his conviction became final (*see Clay v. United States*, 537 U.S. 522 (2003) (explaining "became final" and "direct review," as used in § 2244(d)(1)(A))--not April 24, 1996. There is no statutory exception to subsection (d)(1)(A), nor is there any other delayed accrual rule, for cases where the conviction "became final" prior to April 24, 1996.

Section 2244(d)(1) thus violates the Due Process Clause, as construed by more than a century and a half of this Court's case law, at least as to those petitioners, like Pace, whose convictions became final more than one year prior to the enactment of the statute. As early as 1819, an opinion by Chief Justice Marshall declared:

> If, in a state where six years may be pleaded in bar to an action of *assumpsit*, a law should pass declaring that contracts already in existence, not barred by the statute, should be construed to be

within it, there could be little doubt of its unconstitutionality.

Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 207 (1819). Legislatures have generally heeded that warning ever since. In enacting AEDPA, however, Congress did not. The appropriate response is not for a court to rescue the statute by rewriting it, but to do its duty by declaring the law unconstitutional, if no fair construction of its terms is available to save the law. However well-intentioned the effort, it is an abuse of judicial power to draft and enact curative amendments to unconstitutional laws.

The virtually unanimous position of the circuits that the courts can create a "grace period" contradicts this Court's closest precedent. As the Court has recently stated, in the context of defining a statute of limitations, "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW, Inc. v. Andrews*, 534 U.S. 19, 28 (2001), quoting *Glover v. Andrus Constr. Co.*, 446 U.S. 608, 616-17 (1980). Judicial creation of what amounts to a fifth subsection for § 2244(d)--the "grace period"--is thus an impermissible usurpation of legislative power. AEDPA specifies both the duration and the accrual date of the new statute of limitations; nothing is left for judicial construction. Accordingly, judicial revision of the statute to correct a due process defect--as contrasted with a true judicial construction effort – amounts to an abdication of the power and duty to declare a defective statute unconstitutional. *See United States v. Jackson*, 390 U.S. 570, 578-81 (1968).

While "federal habeas corpus has evolved as the product of both judicial doctrine and statutory law," *Duncan*, 533 U.S. at 183 (concurring opinion), the courts'

attempts to save the statute by announcing a judicially created grace period, *see id.*, transgress the limits of judicial power. True, "where a statute is susceptible to two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter." *United States ex rel. Attorney General v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909). For this reason, judges have often used statutory construction to ensure the presence of a grace period in a new statute of limitations where its absence would raise Chief Justice Marshall's constitutional question, such as cases in which a state enacted a new statute of limitations, or other legislative deadline for action, where none existed before. This can occur, however, only where the statutory language will fairly bear such construction, resulting not in the creation but in the *recognition* of what might be called a "grace period."

This Court has considered many cases involving new statutes of limitations, some questioning the sufficiency of legislated grace periods within which pre-existing claims had to be asserted or lost, and some requiring construction of the statute to determine whether a grace period was intended. In none of these cases, over the course of nearly two centuries, has this Court itself either created a "grace period" of limitations *ex nihilo* or declared what the grace period ought to be; instead the Court has deferred to the legislative judgment. The Court made crystal clear in *Terry v. Anderson*, 95 U.S. (5 Otto) 628, 632-33 (1877), that new statutes of limitations are not unconstitutional under *Sturges* "if a reasonable time is given ... before the bar takes effect." Although stated in the passive voice, this

proviso refers to a time given *by the Legislature*, not by the Court itself. *Id.* at 633.[3]

Where no grace period is explicit in the new provision, avoidance of the constitutional problem has been achieved most often by interpreting an ambiguous term such as "accrue" so as to foreclose retroactive application of a statute of limitations. The AEDPA statute of limitations contains no such language which is susceptible to judicial construction allowing the creation of a grace period. *Compare United States v. Morena*, 245 U.S. 392 (1918) (addressing somewhat similar issue with respect to first establishment of seven-year limit on filing of petition for naturalization, where previously there had been none). In the first case without a statutory grace period to reach this Court, *Ross v. Duval*, 38 U.S. (13 Pet.) 45 (1839), the Court addressed when a Virginia statute of limitations should be deemed to start running after a provision was repealed which had formerly exempted persons who were out of state from the statute's reach. Absent clear statutory language, the Court held that the limitations period would be deemed to start running as of the date when, by virtue of the exemption's repeal, the limitations act "began to operate" against them.[4] This Court gave the same construction to an Illinois statute's use of the phrase, "within sixteen

[3] "In *all* such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed *in this statute* is, under all the circumstances, reasonable. Of that *the legislature* is primarily the judge ...." *Terry*, 95 U.S. (5 Otto) at 633 (emphasis added).

[4] While not explicit in the repealer provision itself, this had been the statutory rule in section 4 of the 1792 statute which was first made applicable to the plaintiff by the 1826 repealer. *See Ross*, 38 U.S. at 62.

years after the cause of such action shall have accrued," when a former exemption was repealed after the time would otherwise have expired. *Lewis ex rel. Longworth v. Lewis*, 48 U.S. (7 How.) 776 (1849).

The identical construction of the statutory term "accrued" was applied to a Kansas statute in *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596, 599 (1873). Some courts have wrongly cited *Sohn* as supporting judicial creation of a grace period, but in fact the case involved nothing of the kind.[5] *See also Union Pac. R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190 (1913); *Herrick v. Boquillas Land & Cattle Co.*, 200 U.S. 96, 102 (1906) (also construing statutes employing unspecified accrual dates). Yet even so, in *United States v. Lindsay*, 346 U.S. 568, 570 (1953), this Court expressly rejected the suggestion that "accrued" is necessarily "a word of art when used in such statutes." Instead, its meaning is to be ascertained in each case. AEDPA, by contrast with the statutes invoked in all those earlier cases, does not involve the

[5] The construction adopted in *Sohn* granted parties with existing claims the same amount of time as the statute gave prospectively to future parties, but measured the passage of time from the date of enactment The Court rejected the possibility of applying the legislation only to actions accruing after its adoption. "Upon principle, it would seem to be clear, that it must commence when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided." *Sohn*, 84 U.S. at 600. The Court did not say what "principle" it referred to. *Sohn* can be distinguished, if necessary, on the basis that the principle cited in that case, if valid, can only be a presumption for the construction of a statute, and in § 2244(d)(1) there is no language susceptible to construction. The statute expressly states all the different dates on which the limitations period can begin to run, and April 24, 1996, is not any of them.

construction of any ambiguous, undefined, or tradition-loaded statutory term, such as "accrued."

Congress plainly specified in AEDPA not only how long the statute of limitations was to be, but also the date as of which it was to begin to run--the latest of four rather clearly specified dates. *See Clay*, 537 U.S. 522. Accordingly, to read a grace period into AEDPA is simply an act of judicial legislation, beyond the lawful authority of any Article III court. *See also Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) (where "Congress explicitly enumerates certain exceptions to a general [rule], additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent"). And without that grace period, the statute is unconstitutional as applied to convictions which became final more than one year prior to April 24, 1996.

Most of the cases commonly cited in discussions of this issue are in fact legislated "grace period" cases, where the role of the court has been to consider whether the grace period allowed by the statute itself was so short as to impair the obligation of contracts, U.S. Const. art. I, § 10 (particularly in cases pre-dating the Fourteenth Amendment) or to be unreasonable under the due process clause. *See, e.g., Texaco, Inc. v. Short*, 454 U.S. 516, 527 n.21 (1982); *Soper v. Lawrence Bros. Co.*, 201 U.S. 359 (1906) (Holmes, J.); *Wilson v. Iseminger*, 185 U.S. 55, 62-63 (1902); *Koshkonong v. Burton*, 104 U.S. 668, 675 (1882); *Terry*, 95 U.S. (5 Otto) at 628; *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457 (1831); *Jackson ex rel. Hart v. Lamphire*, 28 U.S. (3 Pet.) 280 (1830). The same rule of reasonableness has been applied, albeit less frequently, to federal statutes of limitations. *See Block*, 461 U.S. at 286 n.23. In none of those cases, however, did the Court purport to define or determine a "grace period," nor did it approve the action of any lower court in having done so.

Only once, it appears, has this Court held that a legislated grace period was unreasonable and therefore unconstitutional. *See McGahey v. Vir. (In re Brown)*, 135 U.S. 662, 701-09 (1890). Even in that case, the Court did not proceed to declare a longer "grace period" on its own authority. Rather, the statute was declared "unconstitutional *and void*," *id.* at 707 (emphasis added), and the case remanded for further proceedings "as may be required by law and justice." *Id.* at 709.

But here there is no statutory language in § 2244(d) that is "susceptible to [a] construction ... by ... which such questions are avoided." In this circumstance, it is the duty of the judiciary not to correct the defect but to declare the law invalid. *See Miller v. French*, 530 U.S. 327, 339 (2000) (federal court "cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question.") (quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933) (Cardozo, J.)). Judicial review is limited to upholding or striking down the provision enacted by Congress. The approach taken by the circuits represents an unprecedented and dangerous twist on the doctrine of avoidance of constitutional questions in the construction of statutes.[6]

Faced with clear instructions from this Court on how to avoid a due process problem, Congress chose to adopt 28 U.S.C. § 2244(d) without a grace period. As a result, the statute is unconstitutional and void, at least

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[6] *See, e.g., United States v. Lopez*, 514 U.S. 549, 562 (1995); *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 628-30 (1993) (compiling cases on avoidance of unnecessary constitutional issues); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); *see also Jones v. United States*, 526 U.S. 227, 239-40 (1999) (related doctrine of "constitutional doubt").

as to those prisoners whose claims are divested by its plain language. At most, the Court should construe the statute of limitations as *inapplicable* to prisoners in Petitioner's position, in light of the impermissibly detrimental retroactivity that would otherwise exist. *See Landgraf v. USI Film Products*, 511 U.S. 244 (1994). To hold § 2244(d) inapplicable to older cases, such as Petitioner's, on this basis is not to reach an absurd result, giving him and similarly situated prisoners no limit on filing at all. Rather, it would leave in place the prior, longstanding "prejudicial delay" rule, R. Gov. §2254 Proc. 9(a), which was an aspect of the "abuse of the writ" doctrine. See *Vasquez v. Hillery*, 474 U.S. 254, 264-65 (1986).[7] It would also be consistent with history and common law, which eschewed both statutes of limitations and laches principles in habeas corpus cases. *See Heflin v. United States*, 358 U.S. 415, 420 (1959) (Stewart, J.).

B. Even if a "grace period" could be judicially "created," its duration would not be restricted by "statutory" or even traditional equitable "tolling."

If a "grace period" for filing habeas corpus petitions in pre-1996 cases was judicially created and exists outside and despite the statutory language of 28 U.S.C. § 2244(d), then the question arises whether that "grace period" is subject to strict "tolling," particularly statutory tolling, or whether it would instead be governed by a flexible rule of equity and reason. *Saffold* carefully parsed the language of § 2244(d)(2), the statutory tolling provision, to determine the timeliness of filing in that case--even though *Saffold's* case was governed, if at all, by the "grace period" and not by the § 2244(d)(1) statute of

[7] Like the AEDPA statute of limitations, the Rule 9 delay defense was affirmative and waivable in nature.

limitations itself. Yet § 2244(d)(2) only applies (by its terms) to "any period of limitation *under this subsection*." (emphasis added). Whatever sort of creature the "grace period" may be jurisprudentially, it is not a period of limitation "under" subsection 2244(d). *Saffold* never addressed this critical question of statutory language .

If the "grace period" is a judicial creation--rather than a construction of the statute, which it obviously is not--then there is no reason for that created period itself to be "construed" and applied as if it were itself a statute rather than an equitable doctrine. The only question should be whether, under all the circumstances, the prisoner, serving a sentence which became final years earlier, filed his federal habeas petition within a reasonable time after April 24, 1996. *Cf. Block*, 461 U.S. at 286 n.23 (describing as reasonable, under the Due Process Clause, a grace period shorter than newly created limitations period); *McGahey*, 135 U.S. at 701-09 (one year held not a constitutionally sufficient grace period of limitations, given difficulties in disposing of bonds in question).

Viewed purely as a question of reasonableness, exclusion from calculation of that year of all the time that petitioner was responsibly seeking state court relief, thereby assuring exhaustion of remedies in the event he later needed to turn to the federal court, would surely be appropriate. Thus, the equitable rule of reason employed by the court to measure the "grace period" in a given case need not and should not be as tightly constrained as the doctrine of equitable tolling sometimes has been held to be in the lower courts. *See, e.g., Calderon v. U.S. District Court*, 128 F.3d 1283, 1289 (9th Cir. 1997) (extraordinary circumstances "beyond prisoner's control make it impossible to file petion on time"). After all, absent the judicially "created" grace period, the petitioner's action would not be unfairly barred, as in the usual equitable

tolling context. To the contrary, the prisoner would be free to file his or her habeas corpus petition at any time that did not prejudice the respondents' ability to answer. *See Vasquez*, 474 U.S. at 264-65. When the courts apply equitable tolling cautiously, they show deference and respect for the legislative judgment behind the establishment of a statute of limitations. No such restraint need be shown by the courts in ameliorating the limits of their own creations.

No elaborate discussion of the application of § 2244(d) is necessary in a "grace period" case where the *statute* of limitations did not apply at all. On all the facts and circumstances of the case, petitioner Pace plainly filed his federal habeas corpus petition within a reasonable time after the enactment of AEDPA. For this reason as well, the judgment of the court below must be reversed.

II. A FEDERAL COURT MAY NOT GIVE EFFECT TO AN UNCONSTITUTIONAL STATE TIMELINESS RULE IN DETERMINING WHETHER AN APPLICATION FOR STATE POST-CONVICTION REVIEW WAS "PROPERLY FILED" FOR AEDPA STATUTORY TOLLING PURPOSES.

Even if it were decided that federal courts have the power to engraft a grace period onto a claim-destroying statute of limitations to save its constitutionality, and even if the Court were also to find that AEDPA excludes equitable tolling, Petitioner was still entitled to consideration of his first federal habeas corpus petition under a proper application of AEDPA's statutory tolling provision. By deferring uncritically to the state court's finding that Petitioner's November 1996 PCRA petition was untimely as a matter of state law, and therefore not "properly filed," 28 U.S.C. § 2244(d)(2), as a matter of

federal law, the Third Circuit concluded that Petitioner was not entitled to statutory tolling of AEDPA's one-year limitations period. Regardless of whether state court timeliness decisions are entitled to blind deference by federal courts--even those decisions that are arbitrary and irrational--a federal court must not give effect to a state timeliness rule that violates the petitioner's federal constitutional rights.

Yet that is precisely what occurred here. Petitioner's 1996 PCRA petition was held to clash with a newly enacted state statute of limitations that for the first time made untimely a second or subsequent petition for post-conviction relief filed by a prisoner, such as Petitioner, whose conviction had become final on or before the effective date of the new law. Once the new law took effect, Petitioner and those similarly situated lost the right they previously had enjoyed, to apply for collateral review of claims not previously litigated or waived, unhindered by any time bar. A new or amended statute of limitation that has such an effect is unconstitutional and a nullity. This Court should therefore rule that an application for state post-conviction relief will be deemed to have been "properly filed" for purposes of §2244(d)(2) if the application would have been accepted in state court but for an unconstitutional timeliness rule. And whether the state rule passes federal constitutional muster is, of course, a matter for determination by the federal court in its application of § 2244(d)(2), not one on which deference is owed to the state courts.

The salient facts are that Petitioner filed his first and only federal habeas corpus petition *pro se* on December 24, 1999, seeking release from custody under a state court judgment of sentence that had become final in 1986. Assuming the validity of the one-year judicially created "grace period," and further assuming that "tolling" applies to that "grace period" just as it does to a

statutory limitations period, the federal petition had to be filed by April 24, 1997, to be timely unless the limitations period was tolled equitably or by statute. Section 2244(d)(2) provides that the limitations period will be tolled during the time that a "properly filed" application for state post-conviction relief is pending in state court. Petitioner filed his first petition for relief under the PCRA (which was his second petition for state collateral review of his conviction and sentence) on or shortly before November 27, 1996,[8] well within one year after the effective date of the new law. Proceedings on that petition continued until July 29, 1999, when the Pennsylvania Supreme Court denied Petitioner's petition for review. The district court determined that excluding the time during which his PCRA petition was pending, Petitioner's federal habeas corpus petition was timely filed, *Pace v. Vaughn*, 151 F. Supp.2d 586, 595-96 (E.D. Pa. 2001), and that ruling went unchallenged in the court of appeals.

Deferring to the Pennsylvania Superior Court, as it believed under circuit precedent it was obliged to, the court of appeals determined that Petitioner's PCRA petition had not been timely filed under applicable Pennsylvania law. Because it was untimely, said the court, the petition was not "properly filed" within the meaning of §2244(d)(2) and hence was ineffective to trigger statutory tolling under AEDPA.

The Pennsylvania timeliness rule that was held to require dismissal of Petitioner's PCRA petition was enacted into law on November 17, 1995, as an amendment to Pennsylvania's Post-Conviction Relief Act,

[8] The uncertainty in this regard pertains to the "prisoner's mailbox" rule.

42 Pa.Cons.Stat.§ 9545(b). Before that date, there was no time bar in Pennsylvania to the filing of applications for post-conviction relief, whether first petitions, second, or otherwise. With the enactment of §9545(b), which had an effective date of January 16, 1996 (60 days after enactment), a second or subsequent petition filed under the PCRA had to be filed "within one year of the date the judgment [became] final" subject to three specified exceptions that did nothing to ameliorate the claim-destroying impact of the amended law on already-final judgments.[9] As Petitioner's judgment of sentence became final in 1986, the right that he possessed up to January 16, 1996, to file a new state court petition asserting new claims for post-conviction relief was extinguished on that date under rulings of the Pennsylvania appellate courts that post-dated his November 27, 1996 petition.[10]

[9] As discussed in the petitioner's merits brief, there was also a controversy, as of the time of enactment of the 1995 PCRA amendments and for some years thereafter, whether certain judge-made exceptions to the statutory deadline might also be available to extend or waive the limitations period.

[10] Petitioner's application would have been saved from the new time bar if the Superior Court had found that the application was the "first petition" that Petitioner had filed under the PCRA, which it literally was in that his prior petition had been filed under a predecessor statute to the PCRA (the Post-Conviction Hearing Act, or "PCHA") and not under the PCRA. The court failed to give Petitioner the benefit of the uncodified proviso to the 1995 amendment to §9545 that established a one-year grace period from January 16, 1996, in favor of first-time PCRA petitioners whose judgments became final on or before that date. Section 3(1) of Act 1995 (Spec.Sess. No. 1), Nov. 17, P.L. 1118, No. 32, appended in Historical and Statutory Notes to 42 Pa. Cons. Stat. § 9545 (1995 ed.). *Commonwealth v. Thomas*, 718 A.2d 326, 329 (Pa. Super. 1998)

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By extinguishing the right of Petitioner and all prisoners in like circumstances to file a second or subsequent application for post-conviction relief, amended §9545 ran afoul of the constitutional rule of long-standing, enunciated by this Court, that statutes of limitations that cut off existing remedies are invalid unless they afford "'a reasonable time after they take effect for the commencement of suits upon existing causes of action...'" *Texaco,* 454 U.S. at 528 n. 21, quoting *Wilson*, 185 U.S. at 62-63. *See also, e.g., Block*, 461 U.S. at 286 n.23, and *Terry,* 95 U.S. at 634.

AEDPA's time bar was enacted with the same claim-extinguishing feature, but the lower federal courts, unlike their Pennsylvania counterparts, deemed it to lie within their province to rectify the constitutional defect by creating the grace period that Congress had omitted to supply. (The invalidity of that approach is discussed under Point I of this brief.) Quite apart from any question about the retroactivity of AEDPA's limitations period, without a grace period under state law, statutory or judge-made, Petitioner was deprived by the newly amended §9545 of any reasonable opportunity to seek post-conviction relief based on claims that were not and could not have been raised in his first application for post-conviction relief, such as the failure of his PCHA counsel to provide constitutionally effective assistance.

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(holding that "it was the intention of the legislature to permit an otherwise untimely first PCRA petition to be filed within one year following the effective date of the 1995 PCRA amendments, but the exception was not intended to apply to subsequent petitions"; therefore a "second attempt at post-conviction relief...filed more than one year after [petitioner's] judgment of sentence became final...was untimely filed").

What constitutes a reasonable opportunity "in a particular case depends upon its particular facts." *Terry,* 95 U.S. at 637.

Pennsylvania did, to be sure, postpone the effective date of the newly enacted time bar for 60 days. Although probably unintended, one effect of this delay was to give its prisoners a little under two months within which to file a second or subsequent petition. Sixty days may be a sufficient period of time for commercial actors with known causes of action and the assistance of lawyers to react to a change in the law that shortens the time available to them to assert their claims.[11] Sixty days hardly qualifies as an adequate opportunity for untutored, unrepresented prisoners to learn of an as-yet-ineffective change in the statutory law, ascertain its significance to them personally, and formulate an application for post-conviction relief that preserves all of their potential grounds for relief. Of course, if the Commonwealth had made a showing that it took measures to inform its captive population of the new law and provided some means for prisoners such as Petitioner to exercise their swiftly vanishing right to file a new petition for collateral review, those facts would make it a closer call as to whether sixty days was reasonable in the circumstances. Needless to say, no such showing has ever been made, in the district court or elsewhere.

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[11] Nine months was considered adequate in *Terry v. Anderson* to protect the rights of the creditors of an insolvent Georgia bank to press claims against the bank's shareholders that rested upon four-year-old debts. In *McGahey,* 135 U.S. at 701-09, on the other hand, a grace period of one full year was held constitutionally insufficient, in light of the practical difficulties involved in disposing of certain bonds, as required under the amended law.

The Commonwealth did not assert that Petitioner's application was time-barred under amended § 9545(b) until the application had been denied on the merits and an appeal taken to the Pennsylvania Superior Court. When the Commonwealth raised the issue, Petitioner answered in his reply brief, among other things, that the retroactive application of the new time bar to defeat his application would deprive him of his right to due process of law, citing the governing decisions of this Court. In so arguing, he effectively invited the Pennsylvania court to construe the statute in a way that would both spare his petition from the limitations guillotine and preserve the new statute of limitations, as applied to second and subsequent petitions, from being voided on constitutional grounds. The invitation was not accepted, and his petition was ruled untimely.

Untimely the petition may have been for purposes of 42 Pa. Cons. Stat. § 9545, but not for purposes of statutory tolling under 28 U.S.C. § 2244(d)(2). Had Pennsylvania conditioned access to post-conviction relief either on the payment of a nonwaivable fee that exceeded the means of indigent prisoners, or upon the petitioner's oath of allegiance to a particular religious denomination, the Commonwealth would not be heard to say that a petition that failed to satisfy one or the other of these requirements was not "properly filed" for purposes of tolling the AEDPA limitations period. The federal courts may or must look to state law in making the federal law determination of whether a state court petition was "properly filed" for tolling purposes, but the state law must be compatible with the federal Constitution. Otherwise federal courts will find themselves in the position of enforcing unconstitutional state laws and of giving encouragement to states to manufacture impediments to state collateral review as a way of undermining statutory tolling and frustrating access to the Great Writ itself.

The new Pennsylvania timeliness rule denied due process to a class of prisoners to which Petitioner belonged by eliminating their existing right to file an application for post-conviction relief without affording them any more than a chimerical opportunity to exercise the right before it vanished. Such a rule cannot be the legal standard for deciding if a petition was properly fi[illegible] any more than could a state law that imposed a means test in violation of the Equal Protection Clause or a religious test in violation of the Free Exercise and Establishment Clauses.

III. EQUITABLE TOLLING, WHICH OPERATES ON BROAD PRINCIPLES OF REASONABLENESS, IS PERVASIVE IN THE LAW OF LIMITATIONS AND APPLIES TO HABEAS CORPUS CASES UNDER AEDPA

This Court should accept the wisdom of all the Circuits and confirm that principles of equitable tolling apply broadly to the AEDPA statute of limitations, particularly in "grace period" cases. The courts of appeals have uniformly held that the AEDPA filing deadline (including the judicially created "grace period") is not jurisdictional, but rather is a statute of limitations, and that as such, it is subject to equitable tolling. *See Harris v. Hutchinson*, 209 F.3d 325, 329-30 (4th Cir. 2000) (collecting cases). For a variety of important reasons, the AEDPA statute of limitations must be subject to traditional equitable tolling, free of formalistic constraints--as is compatible with Congress's intent

A. Equitable tolling does not involve a set of rigid rules.

"Equity must have a place in every rational system of jurisprudence, if not in name, at least in substance . . . . Every system of laws must necessarily be

defective; and cases must occur to which the antecedent rules cannot be applied without injustice, or to which they cannot be applied at all. It is the office therefore of a judge to consider whether the antecedent rule does apply, or ought, according to the intention of the lawgiver . . . ." 1 JOSEPH STORY, EQUITY JURISPRUDENCE 7-9 (14th W. Lyon ed. 1918). Accordingly, "[i]t is hornbook law that limitations periods are 'customarily subject to equitable tolling,'" and "Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49-50 (2002) (citations omitted). Thus, where consistent with the overall congressional purpose of a statute, a "traditional equitable tolling principle" should be applied to its limitations period. *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1990); *see, e.g., Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (noting that time "requirements in lawsuits between private litigants are customarily subject to 'equitable tolling,' and holding that the same rule applies in suits against the Government); *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (holding that some equitable exceptions are "read into every federal statute of limitations"); 3 JOSEPH STORY, EQUITY JURISPRUDENCE 556-59 (14th W. Lyon ed. 1918).[12]

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[12] This Court has applied equitable tolling under a broad range of federal statutes. *See, e.g., Young*, 535 U.S. at 49-50 (equitably tolling statute of limitations in Bankruptcy Code provision that discharged tax liabilities arising from returns filed more than three years before bankruptcy filing); *Irwin*,, 498 U.S. at 95-96 (applying equitable tolling principles in action under Title VII of the Civil Rights Act of 1964); *Honda v. Clark*, 386 U.S. 484, 500 (1967) (equitably tolling statute of limitations under Trading with the Enemy Act, which statute allowed non-enemy creditors to recover seized assets of Japanese nationals); *Holmberg*, 327 U.S. at 397 (applying

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This sort of "traditional equitable tolling" does not involve a system of rigid or categorical rules, but rather takes into account the particular circumstances of each case, as an aid to the Court in doing justice. "Equity always attempts to get at the substance of things, and to ascertain, uphold, and enforce rights and duties which spring from the *real* relations of parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects, and consequences of a transaction." 1 JOHN NORTON POMEROY, TREATISE ON EQUITY JURISPRUDENCE 703 (Lawyers Co-Operative Publishing Co. 1918) (emphasis original). This includes authority to "interfere in many cases to prevent the bar of the statutes [of limitations] where it would be inequitable or unjust." 3 JOSEPH STORY, EQUITY JURISPRUDENCE 557 (14th W. Lyon ed. 1918); *see also Island Insteel Sys., Inc. v. Waters*, 296 F.3d 200, 214-19 (3d Cir. 2002) (Becker, Ch.J.: choosing, as "a matter of policy" in the absence of a statutory or majority common law rule, a flexible over mechanical rule for equitable tolling to reverse dismissal of civil action under Lanham Act, despite attorney's erroneous decision to sue in court lacking personal jurisdiction over defendant).

Habeas corpus jurisprudence traditionally involved no statute of limitations at all, nor even the doctrine of laches. See *Vasquez*, 474 U.S. at 264-65; *Heflin*, 358 U.S. at 420 (opinion of Stewart, J., for five Justices). For this generous tradition, there were obvious reasons of policy dating to Magna Carta and earlier--the primacy of respect for liberty over efficiency and finality

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equitable tolling principles in equity action under Federal Farm Loan Act).

in the criminal justice system. Yet even though it was classified historically as a writ "at law," habeas corpus was always governed by equitable principles. *Fay v. Noia*, 372 U.S. 353, 438 (1963). Thus, it is particularly suitable that when importing a legalistic statute of limitations into the jurisprudence of the Great Writ legislatively, the courts--unless plainly directed otherwise--continue to apply those equitable principles. One such application is the leavening of the limitations provision with a broad infusion of equitable tolling.

B. Equitable tolling is available even though AEDPA specifies various alternative start dates for the one-year limitations period and includes a specified basis for statutory tolling.

Under AEDPA, the one-year limitations period runs from the latest of four specified times.[13] The presence of these alternative start dates in no way rebuts the presumption, recognized in *Irwin*, 498 U.S. at 95-96, that equitable tolling applies not only in private party suits but also in suits against the Government. *Irwin* poses the "negatively phrased question: Is there good reason to believe that Congress did *not* want the equitable tolling doctrine to apply?" *United States v. Brockamp*, 519 U.S. 347, 350 (1997) (emphasis in original). Here, that negative question must itself be answered in the negative.

A Congressional intent to exclude equitable tolling has been found only where various unusual combinations of factors have pointed toward that conclusion. For example, the Court has excluded equitable tolling when the statute at issue "already effectively allowed for equitable tolling," contained an "unusually generous . . . [twelve year] limitations time period," and concerned an area – land ownership – in which it is of "special importance that . . . [persons] know with certainty what their rights are . . . ." *United States v. Beggerly*, 524 U.S. 38, 48-49 (1998); *see Brockamp*, 519 U.S. at 352 (finding equitable tolling excluded where allowing equitable tolling would "work a kind of linguistic havoc" and would be anomalous in an area of law – tax – that "is not normally characterized by case-specific exceptions reflecting individualized equities").

None of these factors is present in the instant case. The exceptions in § 2244(d)(1) are not equitable in nature, but are designed to ensure that a petitioner will not be inappropriately denied the writ because of later arising circumstances. *Harris*, 209 F.3d at 329.[14] This is

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[13] These are: "(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and make retroactively applicable to cases on collateral review; or (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1).

[14] The presence of a general "good cause" extension provision for filing under the special part of AEDPA (Chapter 154 of title 18), governing capital habeas proceedings in opt-in states, does not suggest that the absence of such a provision in § 2244(d) shows Congress specifically intended to preclude equitable tolling under the latter section. Rather, the point of 28 U.S.C. § 2263(b)(3)(B) is to *limit* "tolling" for otherwise undefined "good cause" in that special class of expedited cases to a period of no more than 30 days. It does carry a negative

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in keeping with the congressional goal behind AEDPA time limits of promoting "comity, finality, and federalism," *Carey*, 536 U.S. at 222 (quoting *Duncan*, 533 U.S. at 178), without undermining the high purposes of the writ. Moreover, the one-year AEDPA limitations period could not plausibly be described as "unusually generous," nor is there a *special* need for finality in deciding the legality of detentions, especially in light of the important interests protected by the Great Writ. The large number of persons found in recent years to be innocent after being sentenced to death due to various miscarriages of justice is testament to the continuing truth of this 40-year-old warning. *See, e.g.*, BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000). Indeed, given these interests, the narrowness of the statutory exceptions, and the *shortness* of the one-year period, the statutory purpose is *better* served by a robust doctrine of equitable tolling. *See Honda*, 386 U.S. at 500 (finding that the "statutory purpose is best served by invoking the equitable tolling doctrine" in an action under the Trading with the Enemy Act)

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implication for the interpretation of the general run of AEDPA cases, but that implication does not imply any intent to eliminate equitable tolling in ordinary habeas cases. Rather, it implies the opposite--that equitable tolling in non-"opt-in" cases does *not* have any such artificial, statutory constraint attached. *See also Young*, 535 U.S. at 53 (presence of statutory tolling rule in one part of statute does not imply displacement of equitable tolling elsewhere, when period to be tolled in each instance is not the same).

There are two primary circumstances in which equitable tolling is permitted--when a diligent litigant files on time, but in the wrong court, as in *Burnett*, and when a litigant is misled or tricked by the adversary into missing a deadline. *Young*, 535 U.S. at 43, 50-51, citing *Irwin*, 498 U.S. at 96. However, those circumstances are not exclusive. *Young*, 535 U.S. at 50 (citing *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984)). For example, where the adversary acts--even legally--to prevent the petitioner from filing on time, the deadline is equitably tolled.[15] The court below erred in concluding that the time necessarily spent by Petitioner in attempting to file, in good faith, a state post-conviction petition which he reasonably believed might be found by the state courts to be timely (or at least might not be found to be untimely) could not be taken into account.

As former Chief Judge Becker wrote in *Waters*, 296 F.3d at 214-19, in words not heeded by his colleagues on the court below, "[A]ll equitable doctrines ... demand flexibility in order to avoid the arbitrariness of rigid rules." *Id.* at 218. This Court agrees: "[T]he basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Burnett*, 380 U.S. at 427. The congressional goal behind the AEDPA time limits is to promote "comity, finality, and federalism," *Saffold*, 536 U.S. at 222, quoting *Duncan*, 533 U.S. at 178, without fatally undermining the high purposes of the Great Writ and its availability to wrongfully convicted prisoners. Those balanced purposes cannot properly be achieved without applying a flexible doctrine of equitable tolling.

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[15] This was the case in *Young*, where petitioners' bankruptcies prevented the IRS from acting within statutory period to audit their returns; accordingly, the limit on the government's time to act was tolled.

The outcome of applying such equitable tolling in this case is clear. Petitioner is entitled to equitable tolling because, after he diligently and reasonably pursued his claims, he was unfairly denied access to habeas relief. When Petitioner filed his PCRA petition, it seemed that the state courts would review his claims even if they were untimely under the PCRA's statutory language. Given this, and especially given that federal law *required* him to pursue those remedies before filing a habeas petition, Petitioner pursued the only reasonable course open to him. This alone demands equitable tolling. Moreover, Petitioner came upon this elaborate legal trap as an indigent, *pro se* litigant and now faces a severe sentence, facts that cannot be lost on traditional equitable principles of fairness and reasonableness.

CONCLUSION

For the reasons discussed in this brief of *amici curiae*, in addition to those discussed in the brief for Petitioner, the judgment of the United States Court of Appeals for the Third Circuit must be reversed and the case remanded to the district court to address the merits of Petitioner's claims.

Respectfully submitted,

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